THE

Indian Evidence Act.

BY

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PREFACE.

The Indian Evidence Act embodies a number of abstract principles based upon the English Law of Evidence modified according to the circumstances of this country. In order to explain and elucidate such principles, commentaries and important decisions form necessary parts of this abstruse subject. So, a commentary has been added to every important section and its meaning explained and illustrated by the help of judicial decisions.

The *special feature* of this book is that it deals with all possible intricate questions that may arise in the application of the Law of Evidence both in civil and criminal trials and their answers in accordance with the views of all the leading authors on the subject.

THE AUTHOR.

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THE
Indian Evidence Act

(Act I of 1872)

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INTRODUCTION

What is Evidence? In its *wider* sense, the word "evidence" means that which demonstrates anything. In its *limited* sense, it includes all the legal means which tend to prove or disprove any matter of fact or point in issue to be submitted to judicial investigation for ascetaining the truth as to any legal rights or liabilities. But a mere argument is not evidence. In this *limited* (*technical*) sense, the word "evidence" means *judicial evidence*.

What is meant by judicial evidence?

What portion of Law is called Evidence? Evidence is one of the two divisions of the law of procedure whereby the rights and liabilities defined by the substantive law are ascertained in judicial proceedings. The other division is called the Rules of Pleadings which are dealt with by the Codes of Procedure. The Law of Evidence and the Rules of Pleadings are called *adjective law*, because they help the administration of the *substantive law* by excluding irrelevant matters and thereby shortening the procedure, saving unnecessary loss of time and of money, and enabling both the judges and the parties to concentrate their mind on the real facts in issue.

Nature and scope of the Law of Evidence.

The Law of Evidence may be *divided* into three parts:—

(1) What facts are relevant or not relevant in a judicial proceeding?

(2) What evidence is to be adduced in proof of such relevant facts?

(3) Who is to adduce such proof and how?

The nature and scope of the Indian Evidence Act.

The Reasons and Object of the Indian Evidence Act. This Act was enacted in 1872 in order to consolidate, define and amend the Law of Evidence then existing in British India. It repealed the whole of the English Common Law rules of Evidence which were not contained in any Statute, Act or Regulation and all rules of Hindu and Mahomedan Law relating to Evidence. But it did not affect any provision of any Statute, Act or Regulation in force in British India which had not been expressly repealed by this Act. So, now, it is incumbent on the person who tenders evidence to show that the evidence is admissible under this Act or under some other Statute, Act or Regulation still in force in British India.

One of the objects of the codification of this Act was that the law with regard to any point dealt with by this Act must be determined by interpreting its language.

Another great object of the codification was to put an end to the prevalent laxity in the admissibility of evidence by laying down a more uniform rule of practice than before.

Relation between the Law of Evidence.

Relation between English and Indian Law of Evidence. Although this Act is fashioned mainly on the model and principles of the English Law of Evidence, it should not be construed by reference to the English Law of Evidence unless there is silence or ambiguity in this Act on any point in question. In interpreting the

Indian Law of Evidence, it should always be remembered that this Act had been enacted by making necessary changes and amendments in the English Law as the circumstances and peculiarities of this country required.

in India and in England.

The Law to govern the Procedure of a law suit. It is a principle of Jurisprudence that the *lex fori* (i.e. law of the country in which the trying Court is situate) should govern the procedure and practice of the trial. The Law of Evidence, being a part of such procedure, governs, together with the rules of pleadings, such trial.

What do you understand by Lord Brougham's observation that "the law of evidence is the *lex fori* which governs the Court" ?

In matters of *substantive law*, the case is governed by the law of the country wherein the rights accrue or causes of action arise. But in matters of procedure and practice (pleadings and evidence which are called *adjective law*), the law of the country or forum (place of situation) of the court governs the trial.

"Whether a witness is competent or not, whether a certain matter requires to be proved by a writing or not, whether certain evidence proves a certain fact or not : these and the like questions must be determined by the law of the place where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it.[1]"

The object of a judicial proceeding. In a judicial proceeding, it is necessary to know three things, viz,

"The object of judicial proceedings is the determination of rights and liabilities which depend

(1) the *rights* and *liabilities* of the parties which the substantive law defines:

(2) the *pleadings* of the parties and the *procedure* of the court to ascertain such rights and liabilities : and

1. *Bain* v. *Whitehaven Railway Co.*, 3 H. L. C. 1.

upon facts." Explain concisely the application of the above principle to a judicial enquiry.

(3) the *rules of evidence* how to prove the facts arising from such pleadings in order to ascertain such rights and liabilities.

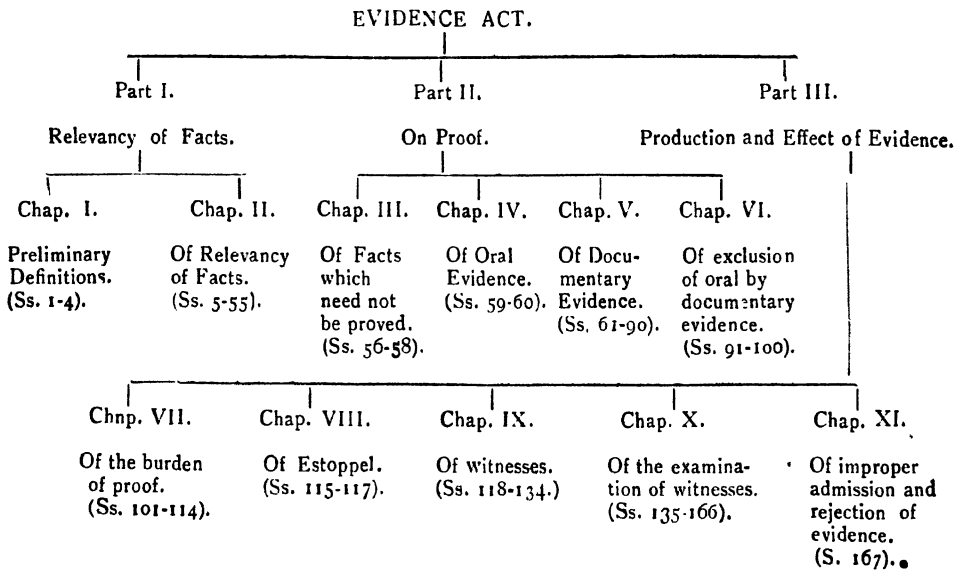
Thus, it is evident that a court holding a judicial inquiry is to go upon facts alleged by one party and admitted or denied by the other, and to frame issues from such allegations of the parties, and then to arrive at a decision one way or the other upon the evidence adduced by the parties according to rules laid down in the Evidence Act as to relevancy of facts, proof of facts and the manner how to produce evidence of such facts. The above principles explain Sir J. F. Stephen's observation that *"all rights and liabilities are dependent upon and arise out of facts."*

This observation may be illustrated by a concrete case. A sues B on a simple bond. B admits the bond but denies the receipt of consideration money. The substantive law is that a contract without consideration is *nuda pacta* (naked contract) not enforceable in law. The issue from the pleadings is :—Did not B receive the consideration money? The onus of proving this negative fact arising from B's special pleading is on B according to the Law of Evidence. B pledges his oath and examines some witnesses. A adduces evidence in rebuttal. The Court holds, on the evidence, that B has failed to discharge the onus satisfactorily or the evidence he has adduced has been sufficiently rebutted by A's counter-evidence and decrees the suit.

This illustration shows what important part the Law of Evidence plays in placing facts before the Court to determine the rights and liabilities of the parties.

Plan or Structure of the Indian Evidence Act.

Explain briefly the structure of the Indian Evidence Act.



Fundamental rules of the English Law of Evidence.

Mention the fundamental rules of English Law of Evidence and comment on them.

(1) Evidence must be confined to the *matters in issue.*

(2) *Hearsay* evidence is not to be admitted.

(3) In all cases, the *best evidence* must be given.

These rules are loosely expressed. The word "evidence" has not been defined and is used in different senses. If the evidence be confined to matters in issue, it would exclude relevant and decisive facts.

Again, the word "hearsay" also has not been defined and is used in different senses.

But the doctrine that "in all cases, the best evidence must be given" is one of the most useful rules.

The English Law of Evidence has been formed by degrees according to the discretion of successive generation of Judges and exigencies of circumstances. It has grown and has not been made. Only recently, the Legislature repealed particular rules as to the disqualification of witnesses by interest and as to the testimony of the parties. But it has not attempted to deal with the main principles of the subject. Inspite of these defects of the English Law of Evidence, it is full of the most vigorous sense and is the result of great sagacity applied to past and varied experience embodied in the English case-law.

* * *

What are the chief characteristic features of the English Common Law system of judicial evidence ?

The chief characteristic features of the English Common Law system of Judicial Evidence. (1) In England, both Civil and Criminal cases are tried by *Judges* with the help of *Juries.* The function of a

judge is to decide a question of *law* and that of a jury to decide a question of *fact*.

What are the respective functions of the Judge and the jury ? What are Best's arguments for or against trials without the aid of the jury ?

(2) In matters of evidence, its *admissibility* is a question of law and the judge alone has to decide it. But the *probative value* of evidence so admitted is a question of fact and the jury alone has to decide whether such fact is proved or not. Under the English Law of Evidence, admissibility of evidence is the rule and inclusion the exception. With a few exceptions on the ground of public policy, all evidence which can throw light on the disputed transaction is admissible.[1]

In Mr. Best's opinion, the following are the advantages derived by reserving all questions of law and practice for the decision exclusively by a Judge and of facts by a jury :—

(a) it prevents the law or practice being altered by any mistake or misconduct on the part of the jury :

"There is but one general rule of evidence, the best that the nature of the case will admit." (Lord Hardwicke). Discuss and develop, and indicate the

(b) it prevents the jury from acting without evidence or on illegal evidence by admitting evidence inadmissible in law and adjudicating thereon :

(c) it enables the Judge to hold general supervision over the judicial proceedings and to comment on the evidence adduced according to his personal knowledge and experience :

(d) it prevents the judge from deciding cases by way of mechanical process : and

[1] In *Ameeroonissa* v. *Abedoonissa*, (23 W. R., 208, 209, P. C.) Privy Council held : "objections made with the view of excluding evidence are not received with much favour at this Board." But it should be limited by the rules of exclusion as embodied in the Evidence Act.

(e) this division of functions of a judge and a jury exercises a sort of mutual and very salutary control over both of them and confers a sort of moral weight over their joint action.

true nature and scope of the rule.

(3) The Judge insists on the party on whom the onus lies to produce *the best evidence which the nature of the case admits.*[1]

In England, the best evidence, if oral, is the direct evidence ; and, if documentary, the document itself. If the direct evidence is not admissible, it is left to the discretion of the judge to admit hearsay evidence, and, if the document itself is not forthcoming, to admit secondary evidence. There is no technical rule in English law as to the admissibility of hearsay and secondary evidence.

Explain what is meant by the rule that "the best evidence is to be adduced to prove questions in dispute" and illustrate your answer by reference to the chief applications of the principle.

In securing the best evidence, a Judge should consider the following facts :—

(a) He should see that the evidence comes through a *proper channel* and from a *proper person.* He should not act on any rumour, or information, or on his own impression, or on pre-conceived knowledge derived from his personal experience.

(b) He should act on the *original evidence* and reject derivative as well as hearsay evidence.

(c) In admitting evidence, he should require an *open and visible connection* between the facts asserted or denied and the facts to be proved as evidence of such assertion or denial.

State how the principle of "the best evidence" of English Law is carried out in the Indian Evidence Act.

[1] The best evidence may, in India, be both oral and documentary. If oral, it should be direct unless and until hearsay or indirect evidence is admitted by the Indian Evidence Act when direct evidence is not available (Ss. 32-39 admit of secondary evidence). If documentary, it should be the document itself except in the cases when secondary evidence is admissible. (Ss. 63-65).

The chief applications of the principle that "the best evidence of which the nature of the case is susceptible must always be produced" are two :—

What are the rules of evidence with regard to *quid probandum* ?

(i) rules relating to *quid probandum* or things (principal evidentiary facts) to be proved, and

(ii) rules relating to *modus probandi* or mode of proving.

To determine the admissibility of evidence, the law requires that there should be an open and visible connection between the principal and evidentiary facts and that such connection must also be reasonable and proximate.[1]

Judicial Investigations and Scientific or Physical Inquiries distinguished.

(1) In physical inquiries, the number of relevant facts is generally *unlimited*. In judicial investigations, it is limited.

What are the leading differences between judicial investigations and scientific inquiries ?

(2) Physical inquiries can be *prolonged* for any length of time while the result in judicial investigations is to be arrived at within a limited time.

(3) The truth arrived at in physical inquiries is also open to *review* by discovery of new facts, but the result of judicial investigations is generally final and rarely open to review.

(4) In physical inquiries, the relevant facts are usually *simple* and are not affected by human passions. In judicial investigations, they are complex and are affected by human passions.

[1] Sections 6-55 of the I. E. Act which deal with relevancy of facts may be called the rules relating to *quid probandum*. The rules which reject hearsay, second-hand or derivative evidence govern the *modus probandi* when the original evidence is withheld. This principle is dealt with in Part II of the Evidence Act.

(5) The result of judicial investigations is *approximate generalisation* and is based on moral certainty, and the experience of a Judge enables him to apply such results to particular facts of a case. But the result of physical inquiries is a deduction from particular to general and from general to particular.

(6) The object of judicial investigations is to determine *jural relation* between two persons, but the object of physical inquiries is to ascertain truth in the interest of science and humanity.

PREAMBLE.

Whereas it is expedient to consolidate, define and amend the Law of Evidence ; It is hereby enacted as follows.

PART I

Relevancy of Facts.

CHAPTER I.—(Ss. 1-4).

Preliminary—(Definitions).

Date and extent.

1. **Date and Extent.** The Indian Evidence Act (I of 1872) extends to the whole of British India, and applies to all judicial proceedings

(a) in or before any *Court*,

(b) including *Courts-martial* (other than ×

But it does not apply to

(i) *affidavits* presented to any Court or officer, or

(ii) proceedings before an *arbitrator*.

* * *

To what extent are the provisions of the Indian Evidence Act applicable to (a) affidavits presented to any court : (b) proceedings before an arbitrator ?

Affidavits. O. XIX. Rules 1-3 C. P. Code and Section 539 Cr. P. Code refer to *affidavits*. Though the Indian Evidence Act is not applicable to affidavits[1], the Act is applicable to the cross-

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1. *Queen Empress* v. *Tulja*, 12 Bom. 36,42.

examination of the witness who swears such affidavits. A declaration in the shape of an affidavit can not be received as evidence of the facts stated in it[1].

Arbitrators. Section 89 and Schedule II of the C. P. Code refer to *arbitrators*. Though the Indian Evidence Act is not applicable to proceedings before an arbitrator, he can not act contrary to the rules of equity and natural justice, because in that case the award made by him will be set aside under para 15 of Schedule II of the Civil Procedure Code on the ground of misconduct or corruption on his part or deception practised on him by any of the parties. Section 167 of the Indian Evidence Act requires that a judgment shall be based on relevant facts. If an arbitrator bases his award only on irrelevant facts, that may amount to misconduct on his part.

Courts Martial. The Army Act (44 and 45 Victoria), Section 127, excludes the application of the Indian Evidence Act to proceedings in any *Court-martial* against the Europeans. So, the Indian Evidence Act is applicable only to proceedings held in Court-martial against the Indians[2].

Judicial proceedings include an inquiry in which evidence is legally taken. 'An inquiry is judicial if its object is to determine a jural relation between two persons[3].' Proceedings under Section 88, Criminal Procedure Code, are not judicial proceeding[4] Proceedings before a Magistrate not authorised to conduct an inquiry is not a judicial inquiry[5].

[1] In re *Iswar Chunder Guho*, 14 Cal. 632.

[2] Under Act V of 1869.

[3] *Queen Empress* v. *Tulja*, 12 Bom. 36, 42.

[4] *The Collector of Benares* v. *Sheo Prasad*, 5 All. 487.

[5] *Queen Empress* v. *Bharma*, 11 Bom. 702, F. B.

Court includes all persons legally authorised to take evidence[1].

2. Repeal of Enactments. The I. E. Act repeals

Repeal of enactments.

(1) all rules of evidence not contained in any Statute, Act or Regulation hitherto in force in British India :

(2) All rules, laws and regulations as have acquired the force of law under the Indian Councils Act, 1861, in so far as they relate to any matter provided for in the I. E. Act :

(3) the enactments in Schedule III hereto.

Proviso. Nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

I. E. Act not exhaustive. *The law of evidence in India outside the I. E. Act* is contained in some sections of the Indian Registration Act, the Indian Limitation Act, the C. P. Code, the Transfer of Property Act, the Cr. P. Code etc. So, the I. E. Act is *not exhaustive* as to the rules of evidence in force in British India.

3. Interpretation clauses. In this Act, the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

Interpretation clauses.

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[1]. *Ibid.*

Define : "Court."

(1) "Court" includes all Judges and Magistrates, and all persons, *except arbitrators*, legally authorised to take evidence.

This definition is not self-contained [1], because a Court of Sessions which tries cases with the aid of jurors consists of a Judge and jurors. Again, a commissioner, appointed under the C. P. Code and authorised to take evidence, is also a court. There is a divergence of opinion as to whether a registering officer who is authorised to take evidence is a Court or not.

Define : "Fact."

(2) "Fact" means and includes—

(i) any *thing*, state of things, or relation of things capable of being perceived by the senses ;

(ii) any *mental condition* of which any person is conscious.

ILLUSTRATIONS

Clause (i) (*a*) That there are certain objects arranged in a certain order in a certain place is a fact.

Clause (i) (*b*) That a man heard or said something is a fact.

Clause (i) (*c*) That a man said certain words is a fact.

Clause (i) (*d*) That a man holds a certain opinion, has an intention, acts in good faith or fraudulently, or uses

Clause (ii) a particular word in a particular sense, or is or was, at a specified time, conscious of a particular sensation, is a fact.

Clause (ii) (*e*) That a man has a certain reputation is a fact.

[1]. *R* v. *Ashutosh Chuckerbutty*, 4 *Cal.* 488, 493.

[**Clause (i)** refers to *external* senses. Illustrations (*a*), (*b*) and (*c*) fall under this clause.

Clause (ii) refers to *internal* senses or mind. Illustrations (*d*) and (*e*) fall under this clause.

The word *"conscious"* means knowing or remembering.

(3) Relevant. One fact is said to be "relevant" to another when the one is *connected* with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.

Define : 'Relevant."

Relevancy determines the question[1] of admissibility of facts as evidence. But *all relevant facts are not admissible as evidence* because some may be excluded by sections other than the sections 5-55 both inclusive which deal with relevancy of facts e. g. an estoppel may exclude a relevant fact.

What is meant by the expression "relevancy" as referring to the admissibility of evidence in a judicial inquiry ?

One fact can be relevant to another when they stand to each other in any of the following ways :—

(*a*) that, according to the *common course of events*, the former fact, taken by itself or in connection with other facts, *proves* the past, present or future existence or non-existence of the latter fact :

Difference between Relevancy and Evidence.

(*b*) that, according to the *common course of events*, the former fact, taken by itself or in connection with other facts, *renders probable* the past, present or future existence or non-existence of the latter fact.

Sections 6-55 deal with relevancy of facts. They have been synthetically put in the two clauses (*a*) and (*b*) stated above.

1. *Lala Lakhmi* v. *Saiyed Haider*, 1 C. W. N. CCLXVIII.

"Relevancy" and "Proof" distinguished.

Distinguish between "Relevancy" and "Proof."

Relevancy means what facts are to be proved. *Proof* means establishment of facts from the evidence adduced. *Evidence* means statements, both oral and documentary, which are permitted to be placed before a court of justice. All facts relevant may not be permitted by some sections of the Indian Evidence Act to be placed before the court. Proof is the effect of evidence. The answer to the question "what facts may be proved" constitutes relevancy. The answer to the question "how such relevant facts are to be proved" constitutes (*a*) evidence, (*b*) the mode of adducing such evidence, and (*c*) the result of such evidence.

* * *

Define : "Facts in issue."

(4) Facts in issue. The expression "facts in issue" means and includes any fact from which, either by itself, or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied, in any suit or proceeding, *necessarily* follows.

Explanation—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any court records an issue of fact, the fact to be asserted or denied in the answer to such issue is a fact in issue.

ILLUSTRATION

A is accused of the murder of B. At his trial the following facts may be in issue :—

(a) that A caused B's death ;

(b) that A intended to cause B's death;

(c) that A had received grave and sudden provocation from B;

(d) that A, at the time of doing the act which caused B's death, was, by reason of unsoundness of mind, incapable of knowing its nature.

"*Facts in issue*" mean those facts which are alleged by one party and disputed or denied by the other and which form the subject-matter of decision in a criminal proceeding or in a civil suit. They may be divided into

What do you understand by "a fact in issue" and how is it distinguished from or related to "an issue of of fact"?

(i) *issues of fact*, and

(ii) *issues of law*.

The I. E. Act has to deal only with the issues (questions) of facts, and the substantive law has to deal only with the issues of law.

In a criminal case, the charge framed against the accused may be called a fact in issue. A is prosecuted for having in his possession an article of B. The evidence offered by the prosecution does not satisfactorily prove that A got the article by theft. But A fails to show that he received the article *bona fide* without knowing that it was stolen property. He may be charged with receiving stolen property with the knowledge that it was stolen. This charge is a fact in issue.

In a civil suit, issues may be framed both of law and of facts from the pleadings of the parties for the decision of a particular case. A sues B on a bond. B denies the execution of the bond and also pleads undue influence in the alternative alleging certain facts. The following issues shall be framed :—

(a) Whether B has executed the bond ?

(b) Whether B's allegations constitute an undue influence ?

The issue (a) is an issue of fact while the issue (b) in an issue of law.

The issue (b) recorded in answer to the issue (a) on B's asserting the facts of undue influence illustrates the *Explanation.*

* * *
Define : "Document."

(5) **Document.** 'Document' means any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means intended to be used, or which may be used, *for the purpose of recording that matter.*

ILLUSTRATIONS

A *writing* is a document : words *printed, lithographed,* or *photographed* are documents.

A *map* or *plan* is a document.

An *inscription* on a *metal plate* or *stone* is a document.

A *caricature* is a document.

The definition is wide enough to include *any representation* on any material substance by writing or any other symbol to express an intention.

* * *
Define : "Evidence."

(6) **Evidence.** 'Evidence' means and includes :—

(1) all statements which the court *permits* or *requires* to be made before it by witnesses in relation to matters of fact under enquiry :

such statements are called *'oral evidence';*

(2) all documents produced for the inspection of the court :

such documents are called *'documentary evidence'*.

This definition is *more illustrative than exhaustive.* Besides the oral statements of witnesses and documents produced for the inspection of the court, there may be many materials and circumstances (e. g. result of a local investigation by the Court itself or by a Commissioner) which influence the decision of the court.[1] (See the general definition of the term 'evidence' in page 1.)

Classification of Evidence. (1) According to the *Indian Evidence Act,* evidence may be classified into four divisions :

(a) Oral or Documentary.
(b) Primary or Secondary.
(c) Direct or Circumstantial.
(d) Original or Hearsay.

(2) According, to Mr. Best, the *English Law of Evidence* is divided as follows :—

(a) *Direct* or *indirect*. "When the testimony of a witness is based on the existence or non-existence of facts in issue, it is called *direct* evidence ; and when the testimony of a witness is based on a relevant fact from which the facts in issue may be inferred, it is called *indirect* (*circumstantial*) evidence".

Explain : "circumstantial evidence."

But, in section 60, the word "direct evidence" means the evidence coming from the best source. In this sense, it includes both direct and circumstantial evidence, and is distinguished from 'hearsay evidence'.[2]

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[1] *Joy Coomar* v. *Bundhoolall*, 9 Cal. 366.

[2] *Neel Kanto* v. *Juggobundho Ghose*, 12 B. L. R, App. 18.

When the inference or conclusion is a necessary consequence of the law of nature, it is conclusive. But where it leads only to a probability, it is merely a presumption.

(*b*) *Real* or *personal.* Real evidence means evidence which is derived from things or persons treated as things. Personal evidence is derived from human beings.

(*c*) *Original* or *unoriginal* (*derivative*). Original evidence means evidence which carries its evidentiary value by itself. Derivative evidence is that which depends on some other facts to derive its force.

What is Pre-appointed Evidence ?

(*d*) *Pre-appointed* (*pre-constituted*) or *Casual.* Evidence created or preserved for the use of the public or private persons to prove a right or obligation in future, ordinarily in the form of instruments, is called pre-appointed evidence. Any evidence which is not so pre-appointed is called casual evidence.

Are there any and what matter other than those falling within the definition of evidence on which proof could be legally based ?

Matters not coming within the definition of "Evidence" as given in the Act may form the basis of proof. A Court takes a thing proved after considering the matters before it. The word "matter" may include *evidence* as defined in this Act and *matter other than such evidence* e.g. matters orally admitted in Court or the result of a local investigation under the Civil Procedure Code. Section 165 requires that a judgment must be based on the facts before the Court, relevant and duly proved upon a consideration of the whole of the evidence and the probabilities (other than the evidence) of the case. A Judge is also entitled to use his general knowledge and experience in determining the value of evidence.

(7) **Proved.** A fact is said to be "*proved*" when after considering the *matters*

before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it *exists*.

When is a fact said to be proved, disproved, and not proved ?

(8) Disproved. A fact is said to be disproved when, after considering the *matters before it*, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it *does not exist*.

Define : "Disproved."

(9) Not Proved. A fact is said to be 'not proved' when it is neither proved nor disproved.

Matters include evidence and other facts and circumstances which are placed before a Court to persuade its mind to a judgment.

"Proof" is the result or effect deduced from evidence, while "*evidence*" is the medium of proof. A judgment is the consequence of such proof. Thus, evidence and proof are related to each other as cause and effect.

What do you understand by "proof"? Distinguish between 'proof' and 'evidence'.

Moral conviction or certainty does not amount to proof. A judge should not mould evidence to suit the exigencies of a particular occasion [1].

There is no Indian Law which recognises different degrees of proof in different cases. (*Weston* v. *Peary Mohan Dass*, 40 Cal. 898).

Difference between disproved and not proved. In a *criminal* case, a fact which is

1. *Barindra Kumar Ghosh* v. *Emperor*, 37 Cal. 467.

disproved or not proved will have the same effect against the accused, because he will get the benefit of doubt if the charge is not proved against him. It is not incumbent upon him to disprove the charge against him. But in *civil* cases, if a fact is not proved by the evidence on the record, the person on whom the burden of proof lies will lose the case. If such a person establishes a *prima facie* case and it is disproved by the evidence in rebuttal, such person shall also lose the case.

State some of the more important provisions of the law of evidence which are peculiar to criminal trials and inapplicable to the trial of civil cases.

The Provisions of the I. E. Act which are peculiar to criminal trials are sections relating to confessions (ss. 24-30), character (ss. 53-54) and incompetency of parties as witnesses (s. 120).

In criminal trials, the accused is not convicted where there is any reasonable doubt or there is any circumstance which makes the evidence against him compatible with his innocence. In order to persuade a Judge of the guilt of the accused, the evidence before him shall amount to his conviction of a "*moral certainty*" as to such guilt.[1]

Is there any difference as to the effect of evidence in civil and in criminal proceedings ? If so, what ? Write notes on : "moral certainty."

It is used in contradistinction to "physical certainty" or the physical possibility of the evidence can never be excluded (Best, sec 95). The doctrine of estoppel applies to civil proceedings only.

In civil cases, a judge acts more upon the preponderance of proof and probability although the evidence before him is not altogether free from doubt.[2]

Write notes on : "corpus delicti."

[**Corpus Delicti** means a fact that a crime has been committed. The general rule is that to prove *corpus delicti,* facts constituting a crime should be directly proved independently of circumstantial

[1] *R* v. *Madhub Chunder,* 21 W. R, Cr, 13, 19, 20.

[2] *Ibid.*

evidence. But there are cases in which the *corpus delicti* can be proved by direct and positive evidence. In such cases, if the circumstances are such as to make it morally certain that a crime has been committed, the inference that it was committed is treated as safe as any other inference. So the rule now stands that no person shall be convicted without proof of the *corpus delicti* either by direct evidence or by cogent and irresistible grounds of inference deduced from circumstances.

Rules of Evidence are fetters on justice. The Law of Evidence is the *lex fori* which governs the courts in which litigation is instituted. As the Law of Evidence prescribes rules according to which evidence in proof of facts is to be entertained in certain cases, some evidence is to be excluded. So, by such exclusion, a restraint is sometimes put on justice. But the rules of Evidence have been framed to help justice. Though, in some cases, such rules may work injustice, they, as a general rule, promote the ends of justice.

Comment : "Rules of evidence are fetters on justice."

4. (1) **May Presume.** Whenever it is *provided* by this Act that the court may presume a fact, it *may* either regard such fact as proved unless and until it is disproved, or may call for proof of it.

What do you understand by the terms "may presume" ?

(2) **Shall Presume.** Whenever it is *directed* by this Act that the court shall presume a fact, it *shall* regard such fact as proved unless and untill it is disproved.

What do you mean by the term "shall presume."

(3) **Conclusive Proof.** When one fact is declared by this Act to be conclusive proof of another, the court *shall*, on proof of the one fact, regard the other as proved, and *shall not allow evidence to be given for the purpose of disproving it.*

What is meant by presumption

and conclusive proof ?

A Presumption means "a rule of law that courts of Judges shall draw a particular inference from a particular fact, or from a particular evidence, unless and until the truth of such inference is disproved." (Stephen's Digest).

Presumptions may be divided into :—

What are presumptions ? How far and to what extent are they embodied in the I. E. Act ?

(a) *Presumptions of fact* which may be drawn from experience and observation of the course of nature, the constitutions of human mind, ordinary springs of human action, usages and habits of society, domestic relationships and transactions in business. Sections 86 to 88, 90 and 114 refer to such presumptions. A court has discretion to act on such presumptions ; and, in that case, the person against whom the presumption is drawn may be called upon to rebut it. A court may not act on such presumptions alone but may call upon the person upon whom the onus lies to adduce further evidence confirmatory to such presumptions.

(b) *Presumptions of law.* They are inferences which the law assumes on the basis of some facts. Such presumptions are really the rules of law. They may be divided into two classes :—

(i) rebuttable presumption which admits of being disproved by the party against whom it is drawn. Sections 79 to 85, 89, 105, 107-111 refer to such presumptions :

(ii) irrebuttable or conclusive presumption which the law does not allow the party against whom it is drawn to disprove by evidence. Sections 41, 112 and 113 refer to such presumptions.

What is the difference between conclusive and rebuttable Presumptions.

Difference between conclusive and rebuttable Presumptions of Law. Rebuttable presumptions of law are such rules of law which the courts shall presume. But they are not hard-and-fast presumptions and the party against

whom they are made are entitled to show that the presumptions or inferences are not correct. Such presumptions shall stand good unless and until they are disproved. of Law?

Conclusive presumptions are such inference of law as law peremptorily makes and does not permit them to be rebutted. They are really *'fictions of law'* and form part of law for the advancement of justice.

Difference between presumptions and fictions of law. Presumptions of law are drawn like presumptions of fact on the uniformity and are the result of experience. They are invested with the authority of a rule of law in the interest of justice. They shall stand good until they are disproved. So, they are rebuttable presumptions. What is the difference between presumptions of law and fictions of law?

Fictions of law are dictated by policy and expediency. Conclusive presumptions of law are a kind of fictions of law. They were introduced at first in the interest of justice on some reasonable basis but have become hallowed into law though the reasons which necessitated their introductions have ceased to exist.

CHAPTER II.

OF THE RELEVANCY OF FACTS.

5. Of what evidence may be given. Are all relevant facts admissible under the Indian Evidence Act?

Evidence may be given, in any suit or proceeding, of the existence or non-existence

(a) of *every fact in issue*, and

(b) of such facts as are hereinafter *declared to be relevant*; and of no others.

Explanation. This section shall not enable any person to give evidence of fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure..

ILLUSTRATIONS.

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death .

At A's trial the following facts are in issue :—

A's beating B with the club :
A's causing B's death by such beating :
A's intention to cause B's death.

(b) A suitor does not bring with him, and has in readiness for production at the first hearing of the case, a bond on which he relies. The section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings otherwise than in accordance with the conditions prescribed by the Civil Procedure Code.

Explanation.

Difference between Indian and English Law as to admissibility of evidence. In India, when any evidence is tendered, the person tendering the evidence must show that it is admissible in evidence under some section of the Indian Evidence Act. It appears from illustration (b) that he is also required to show that he has complied with the provisions of the law relating to the production of such evidence : and the explanation shows that the admissibility of evidence also depends on provisions of other laws to which the relevancy of evidence is subject. *'Relevancy and admissibility are not, therefore, co-extensive and interchangeable terms.'* A thing may be relevant but it can not be admitted in evidence

"Relevancy and admissibility are not co-extensive and interchangeable terms" Give instan-

if it is excluded by any other provisions of the Evidence Act or any other special or local law. Relevancy has a wider scope than admissibility and has to work subject to the rules of admissibility prescribed by any other provisions of law. *Public policy, considerations of fairness, and speedy disposition of litigation* may also exclude evidence though relevant within the meaning of the Indian Evidence Act, e. g., estoppels by judgment and by conduct (sections 115-117) may exclude evidence although such evidence may be relevant.

ces of and reasons for for this rule.

According to the *English Law of Evidence*, any fact may be admissible in evidence provided it is the *best* (*primary not secondary*) *evidence and not hearsay* (*statements of persons not called as witnesses*) *evidence* Subject to these two exceptions, the English Law declares that any fact may be admitted in evidence.

What is necessary to make a fact relevant? A fact is relevant to another fact when the existence of the one can be shown to be the cause or effect of the existence of the other or when the existence of the one, either alone or together with other facts, renders the existence of the other highly probable or improbable according to the common course of events. Sections 6-55 show how one fact is relevant to another (See also the definition of the term "*relevant*").

What is necessary to make a fact relevant?

Are all facts declared relevant by the Evidence Act admissible under Part II of the Act? Explanation to this section makes the question of relevancy dealt with by sections 6-55 subject to the question of admissibility prescribed by any provision of the law for the time being in force relating to civil procedure. Sections 91-99, 115-117, 121-130 of Part II of the Evidence Act restrict the admissibility of relevant facts mentioned in Part I.

Are all facts declared relevant by the Evidence Act admissible under Part II of the Act?

Explain the two-fold grounds of irrelevancy stated by Best.

The two-fold grounds of irrelevancy. The most important function of a Judge is to ascertain the point or points in issue or dispute between the parties. In order to do that, he has to determine

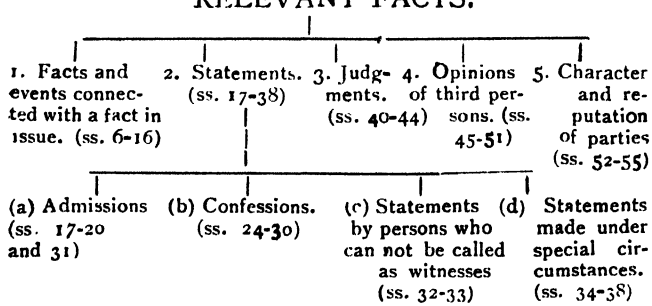
(i) the connection between the *principal fact* (fact to be proved) and the *evidentiary fact* (fact to prove the principal fact), and

(ii) the facts set forth in the pleadings or admitted by the party against whom the evidence is offered.

These two-fold grounds enable the Judge to exclude the irrelevant matters.

'A party filing a document can not object to its admissibility when the opposite party seeks to use it against him.'[1]

An appellate court can not entertain an objection to the admissibility of a document admitted in the original court without objection.[2]



[1] *Raman* v. *Secretary of State*, 24 All. 427.

[2] *Chimnaji Govind* v. *Dinkar*, 11 Bom. 320: *Akbur Ali* v. *Bhyea Lal* 6 Cal. 666.

6. Relevancy of Facts forming part of the same transaction. Facts which, though not in issue, are so connected with a fact in issue as to *form part of the same transaction*, are relevant, whether they occur at the same time or place or at different times and places.

ILLUSTRATIONS.

(a) A is accused of the murder of B by beating him. Whatever was said by A or B, or by the bystanders, at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurence of these facts is relevant as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

"Res Gestae" *literally* means *"exploits."* In its *legal* sense, it means a transaction or the principal fact in issue (*factum probandum*).

Write notes on : "Res Gestae".

It may be defined as "those circumstances which are the automatic and undesigned incidents of a

particular litigated act and which are admissible when illustrative of such act."

The collateral facts or surrounding circumstances forming the same transaction[1] with the principal fact are essential to be known in order to have a right understanding of the nature of the transaction.[2] Principal and collateral facts are always intimately interwoven and each has its inseparable attributes acting and inter-acting upon each other.

7. Facts which are occasion, cause or effect of facts in issue. Facts which are the *occasion*, *cause* or *effect*, immediate or otherwise, of relevant fact or facts in issue, or which constitute the *state of things* under which they happen or which afforded an *opportunity* for their occurence or transaction, are relevant.

ILLUSTRATIONS.

Occasion.

(a) The question is, whether A robbed B: The facts, that, shortly before the robbery, B went to a fair with money in his possession, and that heshowed it, or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether A murdered B: Marks on the ground produced by a struggle at or near the place where the murder was committed, are relevant facts.

Cause or effect.

(c) The question is, whether A poisoned B:

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[1] *Chain Mahto* v. *The Emperor*, 11 C. W. N. 266, 270.

[2] What is transaction? *Gujju Lall* v. *Fatteh Lall*, 6 Cal. 171 F. B.

The state of B's health before the symptoms ascribed to poison, and habits of B known to A, which afforded an opportunity for the administration of poison, are relevant facts.

State of things.

8. Motive, preparation and previous or subsequent conduct. Any fact is relevant which shows or constitutes a *motive* or *preparation* for any fact in issue or relevant fact.

When and subject to what conditions is the conduct of a person relevant?

The *conduct* of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein, or relevant thereto, and the conduct of any person, an offence against whom is the subject of any proceeding, is relevant, if such conduct influences, or is influenced by, any fact in issue or relevant fact, and whether it was *previous* or *subsequent* thereto.

Explanation I. The word "conduct" in this section does not include statements unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation II. When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

ILLUSTRATIONS.

(a) A is a tried for the murder of B.

The facts, that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

Motive

Motive

(b) A sues B upon a bond for the payment of money ; B denies the making of the bond.

The fact, that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

Preparation

(c) A is tried for the murder of B by poison:

The fact, that, before the death of B, A procured poison similar to that which was administed to B, is relevant.

Preparation

(d) The question is whether a certain document is the will of A:

The facts, that, not long before the date of the alleged will, A made inquiry into matters to which the provision of the alleged will relate, that he consulted Vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e) A is accused of a crime:

Conduct

The fact, that, either before, or at the time of or after, the alleged crime, A provided evidence which would tend to give to the facts of the case an, appearance favourable to himself, or that he destroyed or concealed evidence or prevented the presence, or procured the absence, of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether A robbed B :

Conduct

The facts, that, after B was robbed, C said in A's presence—"the Police are coming to look for

the man who robbed B", and that, immediately afterwards, A ran away, are relevant.

(g) The question is, whether A owes B rupees 10,000 : Explanation II.

The facts, that, A asked C to lend him money and that D said to C in A's presence and hearing "I advise you not to trust A, for he owes B 10,000 rupees" and that A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime : Explanation II.

The fact, that, A absconded after receiving a letter warning him that inquiry was being made for the criminal and the contents of the letter, is relevant.

(i) A is accused of a crime : Conduct.

The facts, that, after the commission of the alleged crime, he absconded or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether A was ravished : Explanation I.

The facts, that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact, that, *without making a complaint*, she said that she had been ravished, is *not relevant* as conduct under this section, though it may be relevant

as a dying declaration under Section 32, clause (1), or

as corroborative evidence under Section 157.

(k) The question is, whether A was robbed :

Explanation 1.

The facts, that, soon after the alleged robbery, he, made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact, that, he said he had been robbed *without making a complaint*, is *not relevant* as conduct under this Section, though it may be relevant—

as a dying declaration under Section 32, clause (1), or

as corroborative evidence under Section 157.

Admission by conduct.

Analysis. This section makes the following things relevant :—

(a) motive or preparation for a fact in issue or relevant fact :

(b) previous or subsequent conduct of parties or their agents to a suit or proceeding :

(c) the conduct of the complainant :

(d) statements of parties accompanying and explaining their conduct :

(e) statements of third parties made to or in the presence of the parties affecting their conduct.

Explanation II. In order to make the statements of third persons relevant against the conduct of any party it shall be shown that such party had actual knowledge of such statements being made and that such statements made or likely to have made his conduct affected thereby and that such party had an opportunity of replying to or contradicting the statements.

Can the statement of a person amount to conduct ? If so, when ?

When statement amounts to conduct ?. The word "conduct" in Section 8 does not include statements unless those statements accompany and explain acts other than those statements. Such statements may be relevant under section 32 or as corroborative evidence under section 56.

Statement by the person injured made in the presence of the accused is admissible under sections 6 and 8. Statements contained in judgments and decrees are not admissible as evidence of conduct. In *Queen Empress v. Abdulla*,[1] signs made by the deceased was not admissible as statements as to her death because there was nothing to connect them with the cause of death. In *Emperor* v. *Misri*[2] the conduct of the accused in taking the police to a certain place and pointing out ornaments which the deceased was wearing at the time of her death was admissible as her conduct. *Illustrate by decided cases.*

Subsequent conduct in fabricating evidence to prove *alibi* is admissible to prove a consciousness of impending danger and guilt.[3]

9. Facts necessary to explain or introduce relevant facts. Facts necessary

(1) to explain or introduce a fact in issue or relevant fact, or

(2) which support or rebut an inference suggested by a fact in issue or a relevant fact, or

(3) which establish the identity of any thing or person whose identity[4] is relevant, or

(4) which fix the time or place at which any fact in issue or relevant fact happened, or

[1] 7 All. 400 F. B; 21 B. L. R. 724.

[2] 31 All. 592.

[3] *Queen Empress* v. *Sami*, 13 M. 426.

[4] *Emperor* v. *Panchu Das*, 47 Cal. 671 F. B.

(5) which show the relation[1] of parties by whom any such fact was transacted,

are relevant, in so far as they are necessary for that purpose.

ILLUSTRATIONS

(a) The question is whether a given document is the will of A :

The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A ; B affirms that the matter alleged to be libellous is true :

The position and relation of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime :

The fact, that, soon after the commission of the crime, A absconded from his house, is relevant under section 8, as conduct subsequent to, and affected by, facts in issue.

The fact, that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant except in so far as they are necessary to show that the business was sudden and urgent.

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[1] *Radhan Singh* v. *Kuarii Dichhit*, 18 All. 98.

(d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A "I am leaving you, because B has made me a better offer". This statement is a relevant fact as *explanatory of C's conduct* which is relevant as a fact in issue.

(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it, "A says you are to hide this" : B's statement is relevant as *explanatory of a fact which is part of the transaction.*

(f) A is tried for a riot, and is proved to have marched at the head of a mob :

The cries of the mob are relevant as explanatory of the nature of the transaction.

When are acts and statements relevant ? Is there any difference between English and Indian Law ?

10. Things said or done by conspirator in reference to common design. Where there is *reasonable ground*[1] *to believe* that two or more persons have conspired together to commit an offence or an actionable wrong, any thing said, done or written by any one of such persons *in reference to their common intention*, after the time when such intention was first entertained by any one of them, is a relevant fact

(a) as *against each of the persons* believed to be so conspiring,

(b) as well as for the purpose of proving the *existence of the conspiracy*, and

(c) for the purpose of showing that *any such person was a party to it.*

[1] *Barindra Kumar Ghose* v. *Emperor*, 37 Cal. 467.

ILLUSTRATION

Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been *ignorant* of all of them, and although the persons by whom they were done were *strangers* to him, and although they may have taken place *before he joined the conspiracy* or *after he left it.*

Cases. The phrase "anything written" includes communications between different conspirators.[1] The statement of an accused made after arrest and not amounting to a confession can not be used against a co-accused.[2]

Essentials to establish conspiracy :—

(a) there must be an *agreement* which may be proved by circumstantial evidence showing a reasonable ground :

(b) the thing done must have been done with reference to the *common intention* :

(c) such intention must have been *entertained by one* of the parties.[3]

[1] *Emperor* v. *Abani Bhusan Chakravorty*, 38 Cal. 169. 178.

[2] *Sital Singh* v. *Emperor*, 46 Cal. 700.

[3] *Balmokand*, P. R. No. 17 of 1917 (Cr.)

Acts and statements of conspirators—English and Indian Law distinguished. In England, acts and statements of conspirators must be in execution or in furtherance of the common design or they must have been made before the accused ceased to be a member of the conspiracy.

What is the difference between English and Indian Law as regards "Relevancy"?

In India, if such acts and statements are done not in execution or furtherance of, but merely in reference to, the common design, or if such acts and statements are made in reference to the common design after the accused has ceased to be a member of the conspiracy, he is liable for them.

A conspiracy means more than the joint action of two or more persons to commit an offence. There must have been some pre-concert.[1] The agreement to conspire may be inferred from circumstances.[2]

Those who come in at a later stage are equally guilty, provided the agreement be proved.[3]

11. When facts not otherwise relevant become relevant? Facts not otherwise relevant are relevant

(1) if they are *inconsistent* with any fact in issue or relevant fact;

(2) if, by themselves or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact *highly probable* or *improbable*.

When are "similar facts" relevant and admissible in evidence? Cite any leading case.

[1] *Nagendra Bala Debee* v. *Emperor*, 4 C. W. N. 528, 530.

[2] *Barindra Kumar Ghosh* v. *Emperor*, 37 Cal. 467.

[3] Ibid.

ILLUSTRATIONS

(a) The question is, whether A committed a crime at Calcutta on a certain day :

The fact, that, on that day A was at Lahore, is relevant.

Inconsistent.

The fact, that, at the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

Improbable.

(b) The question is, whether A committed a crime :

The circumstances are such that the crime must have been committed either by A, B, C, or D. Every fact which shows that the crime could have been committed by no one else, and that it was not committed by either B, C, or D is relevant.

Probable or improbable.

When are "similar facts" relevant and admissible in evidence? In *Reg* v. *Parbhudas*,[1] West, J., said :—" This section is expressed in terms very extensive. But sections 32 and 54 limit its operation. If it is used in extensive sense, most of the sections as to relevancy would have been rendered unnecessary and in many cases complexity would arise to the prejudice of justice."

Necessity of this section. Of the sections 6—10 which deal with *relevancy of collateral facts*, section 6 deals only with facts forming part of *res gestae*. Sections 7 and 8 deal only with causative collateral facts. Section 9 deals only with introductory or explanatory collateral facts: and section 10 deals with acts of one of the conspirators without the knowledge or complicity of another as relevant as well as against the latter.

What is the necessity of Section 11 of the Evidence Act? Explain how evidence of

[1] 11 B. H. C. 90, 91 ; *Emperor v. Panchu Das*, 47 Cal. 671 (1920).

None of these sections has dealt with the collateral fact inconsistent with the fact in issue or relevant fact. Para 1 of section 11 deals with such inconsistent collateral facts which furnishes the defence of *alibi* which is often urged in trials of grievous offences.

alibi becomes relevant.

The following two requirements are necessary to make collateral facts relevant under this section :—

(1) The collateral facts must be proved satisfactorily.

(2) It must afford a reasonable inference as to the matter in issue.[1]

Under certain circumstances, in certain cases, the judgment not *inter partes*, nor *in rem*, nor relating to public matters are admissible to explain the nature of possession to throw light on the motives or conduct of parties or identity of property.[2]

Does this section apparently make all facts relevant ? That this section has not been happily worded has been partially admitted by its author Sir James Fitz James Stephen when he says:— The meaning of this section would have been more fully explained if words to the following effect had been added to it "no statement shall be regarded as rendering the matter stated highly probable within the meaning of this section unless it is declared to be a relevant fact under some other section of this Act." From this it appears that *this section shall be considered as subject to other sections which deal with collateral relevant facts.*

Does not Section 11 apparently make all fact s relevant ? Give two illustrations of fact wihch may be relevant under Section 11 only and not under any other Section of the Evidence Act.

[1] *Khaver Sultan* v. *Rukha Sultan*, 6 B. L. R. 983.

[2] *Lakshman* v. *Amrit*, 24 Bom. 591, 599 : *Tepu Khan* v. *Rajani Mohan Das*, 25 Cal. 522 F. B. holds that *Gujju Lall* v. *Fatteh Lall*, 6 Cal. 171 F. B. is materially qualified by *Ram Ranjan Chakraverty* v. *Ram Narain Singh* 22, I. A. 60 and *Bitto Kunwar* v. *Kesho Pershad*, 24 I. A. 10.

Justice Cunningham says "In applying the section care must be taken not to put too liberal an interpretation on the expressions *probable* and *improbable*."

12. Relevant facts to determine the amount of damages. In suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant.

* * *

What facts are relevant when any right or custom is in question ?

13. Facts relevant when right or custom is in question. Where the question is as to the existence of any *right or custom*, the following facts are relevant :—

(a) Any *transaction*

(i) by which the right or custom in question was created, claimed, modified, recognised, asserted, or denied, or

(ii) which was inconsistent with its existence :

(b) Particular *instances* in which the right or custom was

(i) claimed, recognised or exercised, or

(ii) in which its exercise was disputed, asserted or departed from.

ILLUSTRATION

The question is, whether A has a right to a fishery :

A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in

which the exercise of the right was stopped by A's neighbours, are relevant facts.

Sections 13, 32 and 48. Sections 13, 32 (clauses iv and vii) and 48 deal with facts which are relevant relating to *right* or *custom* (including usage).

Right. This expression means any right of or over property and is *not restricted to incorporeal rights only*.[1]

Custom is a rule which, in a particular district, class or family, has, from long usage, obtained the force of law.[2] A custom must be (a) *ancient*, (b) *certain*, (c) *reasonable*, (d) continuous and uniform, (e) compulsory and not optional, (f) peaceable and (g) not immoral.

If judgments are transactions? Judgments, though not *inter partes*, are admissible in evidence in proof of right or custom asserted or denied from the pleadings embodied in such judgments.

Police orders made to prevent breaches of the peace in cases of dispute as to immoveable property are admissible as evidence of a transaction.[3]

14. Facts showing existence of state of mind, or of body or bodily feeling. Facts

(a) showing *the existence of any state*

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[1] *The Collector of Gorakhpur* v. *Palakdhari*, 12 All. 1. F. B: *Ranchhoddas* v. *Bapu Narhar*, 10 Bom. 439: *Vythilinga* v. *Venkatachala*, 16 Mad 194: *Gujju Lall* v. *Fatteh Lall* 6 Cal. 171 F. B. per Justice Mitter: *Tepu Khan* v. *Rajani Mohan Das*, 25 Cal. 522. The majority of the Judges in Gujju Lall v. Fatteh Lall 6 Cal. 171 F. B. restricted the word "right" to incorporeal rights only.

[2] *Haraprasad* v. *Sheodayal*, I. L. R. 3 I. A. 285.

[3] *Dinamani Choudhurani* v. *Brajamohini Choudhurani*, 26 Cal. 187 P. C.

of mind,[1] such as, intention, knowledge, good faith, negligence, rashness, ill-will, good will towards any particular person, or

(b) showing *the existence of any state of body or bodily feeling*,

are relevant, when the existence of any such state of mind, or body, or bodily feeling is in issue or relevant.

Explanation I. A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the *particular matter* in question.

Explanation II. But, where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be a relevant fact.

ILLUSTRATIONS

Knowledge. (a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article :

The fact, that, at the same time, he was in possession of many other stolen articles, is relevant, as tending to show that he knew each and all of the articles of which he was in possession to be stolen

Knowledge. (b) A is accused of fraudulently delivering to another person a counterfeit coin, which, at the time when he delivered it, he knew to be counterfeit ;

The fact, that, at the time of its delivery, A was

[1] *Baharudin*, 18 C. L. J. 578.

possessed of a number of other pieces of counterfeit coin, is relevant :

The fact, that, A had been previously convicted of delivery to another person as genuine a counterfeit coin knowing it to be counterfeit is relevant. Knowledge.

(c) A sues B for damage done by a dog of B's which B knew to be ferocious :

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant. Knowledge.

(d) The question is, whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious :

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant as showing that A knew that the payee was a fictitious person.

Intention.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B :

The fact of previous publications by A respecting B showing ill-will on the part of A towards B is relevant as proving A's intention to harm B's reputation by the particular publication in question :

The facts, that, there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant as showing that A did not intend to harm the reputation of B.

Good faith.

(f) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss :

The fact, that, at the time when A represented C to B solvent, C was supposed to be solvent

by his neighbours, and by persons dealing with him, is relevant as showing that A made the representation in good faith.

Good faith.

(g) A is sued by B for the price of work done by B upon a house of which A is owner, by the order of C, a contractor :

A's defence is that B's contract was with C :

The fact, that, A paid C for the work in question, is relevant as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

Good faith.

(h) A is accused of the dishonest misappropriation of property which he had found, and the question is, whether, when he appropriated it, A believed in good faith that the real owner could not be found :

The fact, that, public notice of the loss of the property had been given in the place where A was, is relevant as showing that A did not, in good faith, believe that the real owner of the property could not be found :

The fact, that, A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property, and wished to set up a false claim to it, is relevant as showing that the fact that A knew of the notice did not disprove A's good faith.

Intention.

(i) A is charged with shooting at B with intent to kill him.

In order to show A's intent, the fact of A's having previously shot at B may be proved.

Intention.

(j) A is charged with sending threatening letters to B :

Threatening letters previously sent by A to B may be proved as showing the intention of the letters.

(k) The question is, whether A has been guilty of cruelty towards B, his wife : Ill-will.

Expressions of their feeling towards each other shortly before or after the alleged cruelty are relevant facts.

(l) The question is, whether A's death was caused by poison : State of body or bodily feeling.

Statements made by A during his illness as to his symptoms are relevant facts.

(m) The question is, what was the state of A's health at the time when an assurance on his life was effected : State of body.

Statements made by A as to the state of his health at or near the time in question are relevant facts.

(n) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured : Negligence.

The fact, that B's attention was drawn on other occasions to the defect of the particular carriage, is relevant.

The fact, that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(o) A is tried for the murder of B by intentionally shooting him dead : Intention.

The fact, that A, on other occasions, shot at B, is relevant as showing his intention to shoot B :

The fact, that A was in the habit of shooting at people with intent to murder them, is irrevelant. Intention.

(p) A is tried for a crime :

Explanation I. The fact, that he said something indicating an intention to commit that particular crime, is relevant.

The fact, that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

Scope of this section. This section is applicable to cases wherein criminal or wrongful intention is a necessary element to constitute the offence or liability. It is an *exception* to the general rule that *facts gestae* and *collateral facts* must be linked together as cause and effect. It does not extend to cases where the question of guilt or innocence depends upon actual facts and not upon the state of a man's mind or feeling.[1]

Section 14 does not go beyond the English Law.[2] Evidence showing that the accused had similarly cheated other persons is inadmissible.[3] Illustration (a) shows that it is not necessary that all the facts should form part of one transaction, but that they should be parts of a series of similar occurences.[4]

"Evidence must be directed and confined to the matter in issue: but evidence as to matter not in issue may be given in order to prove intent." Explain and Illustrate.

Evidence as to matter not in issue may be given in order to prove intent. Although evidence should, as a general rule, be directed and confined to the matter in issue, facts showing the state of mind, or state of body or bodily feeling may be put in evidence when their existence is in issue or relevant e. g. A is accused of murder of B: here his intention, knowledge or ill-will is a fact in issue to determine whether

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[1] *Empress* v. *M. J. V. Moodeliar*, 6 Cal. 658, 659.

[2] *Queen* v. *Parbhudas*, 11 B. H. C. R. 90; *Emperor* v. *Fakirappa*, 15 Bom. 502.

[3] *Emperor* v. *Abdul Wahed*, A. L. J. 1269.

[4] *Emperor* v. *Debendra Prasad*, 36 Cal. 573.

he has committed an offence under section 302 (murder) or 325 (grievous hurt) I. P. Code.

Motive or intention can not prove an act. If the character of the accused is not a fact in issue, the evidence of bad character is not admissible to prove the commission of the crime by him[1].

Res Inter Alios Actæ. As a general rule, inferences are not to be drawn from one fact to another unless they are specifically connected with each other. Facts which resemble each other can not be said to be specifically connected with each other but sections 14 and 15 are exceptions to this rule. The defences of ignorance, accident, mistake, *bona fides* etc can be rebutted by proving the state of mind, knowledge or intention on the part of the accused in criminal cases, and fraud, malicious intention or negligence on the part of the defendant in civil cases can be proved by the evidence of his intention, knowledge and *mala fides*.

Explanation II. Previous conviction becomes relevant when the existence of any state of mind or body or bodily feeling is in issue or relevant.[2]

15. Facts showing accidents, intention or particular knowledge. When there is a question whether an act was

(a) *accidental or intentional*, or

(b) done with a *particular knowledge or intention*,

the fact, that such act formed part of a

[1] *Mankura Dasi*, 27 Cal. 139.

[2] *Emperor* v. *Alloomiya Husan*, 28 Bom. 129.

series of similar occurences in each of which the person doing the act was concerned, is relevant.

ILLUSTRATIONS

(a) A is accused of burning down his house in order to obtain money for which it is insured :

The facts, that, A lived in several houses successively, each of which he insured, in each of which a fire occured, and, after each of which fires, A received payment from different insurance offices, are relevant as tending to show that the fires were not accidental.

(b) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him He makes an entry showing that, on a particular occasion, he received less than he really did receive :

The question is, whether this false entry was accidental or intentional :

The facts, that, after entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

(c) A is accused of fraudulently delivering to B a counterfeit rupee :

The question is, whether the delivery of the rupee was accidental :

The facts, that, soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D and E, are relevant as showing that the delivery to B was not accidental :

Cases. That the accused has been concerned in a systematic course of conduct of the same specific kind and proximate in kind is relevant.[1]

[1] *Amrita Lal Hazra* v. *Emperor* (1915), 42 Cal. 957.

In an action for defamation, instances of acts of the plaintiff more or less closely resembling the particular act of misconduct imputed to the plaintiff in the libellous statement are not admissible in evidence.[1]

When there is evidence of plain intention, subsequent incidents are not admissible under section 11, and evidence as to whether antecedent and subsequent incidents were accidental or not are also not admissible under section 14 or 15.[2] A. clerk in charge of the renewal of licenses received two annas in excess of the license fee on previous occasions. These facts are not admissible against him under section 14 or 15 in a charge that he has taken two annas in excess.[3]

16. Existence of course of business when relevant. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

ILLUSTRATIONS

(a) The question is, whether a particular letter was despatched :

The facts, that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.

(b) The question is, whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the dead letter office, are relevant.

[1] *Nadirshaw Sukhia*, 15 Bom. L.R. 130.

[2] *Emperor* v. *Panchu Das*, 47 Cal. 671.

[3] *Emperor* v. *Abdul Wahed Khan*, 34 All. 93.

Course of business. If may mean professional business or trade or any transaction public or private.

A refusal to receive a registered letter is sufficient service of notice to vacate.[1]

The following "statements" are relevant under this Act :—

1. Admissions (ss. 17-23 and 31).
2. Confessions (ss. 24-30).
3. Statements by persons who can not be produced as witness (ss. 32-33).
4. Statements made under special circumstances (ss. 34-39).

ADMISSIONS

* * *

How is "admission" defined ? Define "Admission".

17. Admission defined. An *admission* is a statement, *oral* or *documentary*, which *suggests any inference* as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, mentioned in sections 18-20.

They are

(1) Statements made by a party to a proceeding :

(2) Statements made by his authorised agent :

(3) Statements by a suitor in a representative character :

(4) Statements by a party interested in the subject-matter :

(5) Statements by a person from whom interest has been derived by a party (s. 18) :

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[1] *Jogendra Chandra Ghose* v. *Dwarka Nath Karmakar*, 15 Cal. 681.

(6) Statements by a person whose position must be proved as against a party to a suit (s. 19) :

(7) Statements by persons expressly referred by a party to a suit (s. 20).

Scope of Sections 17-29. A statement, oral or documentary, is admissible under sections 17 and 18 as admission. An admission may be proved under sections 21 against the person who made it. Sections 19 and 20 refer to special cases of admission. Section 22 deals with admissions as to contents of a document. Section 23 deals with admissions admissible in civil cases under certain circumstances. Sections 24-26 make an admission by an accused person inadmissible unless it amounts to confessions which are dealt with in sections 27-29. A confession, though not admissible in criminal cases, may be admissible in civil matters[1]. Sections 18-20 are exceptions to the rule that admissions are admissible against the party making them.

18. Statements by party to proceedings or his agent, in representative character, interested in subject-matter, and by person from whom interest derived.

What are admissions ? Who can may admissions ; Is an admission by an agent evidence for or against his principal in a criminal case ?

Statements made by a *party to the proceeding*, or by an agent to any such party whom the court regards, under the circumstances of the case, as expressly or impliedly authorised by him to make them, are admissions.

Statements made by parties to suits, suing or sued in a *representative character*, are not admissions unless they were made while the party making them held that character.

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[1] *Queen Empress* v. *Tribhovan*, 9 Bom. 131, 134.

Statements made by—

(1) Persons who have any *proprietary* or *pecuniary interest in the subject-matter* of the proceeding and who make the statements in their character of persons so interested, or

(2) *Persons from whom the parties* to the suit have *derived their interest* in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements.

Privies may be divided into three classes :—

(1) By blood relation, as heirs, ancestors, coparceners ;

(2) By law, as executors, administrators, testators or persons dying intestate;

(3) By interest or estate, as vendor, purchaser etc.

Agent. If the court regards the agent to have been expressly or impliedly authorised to make the admission, such admission is admissible in evidence both in civil and criminal cases. Such admission need not be made on oath.[1]

Section 18 refers to five classes of persons :—(1) party to a proceeding: (2) agent authorised by such party : (3) party suing or sued in a representative character making admissions : (4) persons having pecuniary or proprietary interest in the subject-matter : and (5) persons from whom the parties to the suit have derived their interest in the subject-matter.

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[1] *Govindji* v. *Chhotalal*, 2 B. L. R. 651.

Cases. Admission by one jointly interested in the subject-matter with others is admissible against others. [1]

Admission of facts made by a pleader binds his client.[2]

But a pleader's admission on questions of law does not bind his client.[3]

Admission or confession of judgment by one defendant can not bind other defendants.[4]

Admissions of a guardian either *ad litem* or next friend can not bind a minor. According to Bombay and Madras High Courts, a guardian appointed under the Guardians and Wards Act can extend the period of limitation by signing an acknowledgment of liability of a debt.[5] But the Calcutta High Court holds otherwise.[6]

19. Admissions by persons whose position must be proved as against party to suit. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person mak-

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[1] *Meajan Matbar* v. *Alimuddi*, 44 Cal. 130.

[2] *Jagapati Mudaliar* v. *Ekambora Mudaliar*, 21 Mad. 274: *Jang Bahadur* v. *Shankar*, 13 All. 272 F. B.

[3] *Narayan* v. *Venkatacharya*, 6 B. L. R. 434.

[4] *Lachman* v. *Tansukh*, 6 All. 395.

[5] *Annapaganda* v. *Sangadigyapa*, (1901) 3 Bom. L. R. 817 ;*Kailasa Padiachi* v. *Ponnukannu Achi*, 18 Mad. 456.

[6] *Chhalo Ram* v. *Bitto Ali*, 26 Cal. 51.

ing them occupies such position, or is subject to such liability.

ILLUSTRATION

A undertakes to collect rents for B. B sues A for not collecting rents due from C to B. A denies that rent was due from C to B. A statement by C that he owed B rent is an admission, and is a relevant fact as against A if A denies that C did owe rent to B.

Admissions by strangers to a suit are not, as a rule, admissible in evidence. But sections 19 and 20 are *exceptions* to this rule. Section 19 makes admissions by strangers admissible when they make themselves liable by such admissions or when they would have made themselves liable if suits had been instituted against them.

Admissions by persons whose position must be proved are in the nature of original evidence and not hearsay though they are not cited as witnesses.[1]

20. Admissions by persons expressly referred to by party to suit. Statements made by a person to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

ILLUSTRATION

The question is, whether a horse sold by A to B is sound: A says to B "go and ask C, C knows all about it". C's statement is an admission.

Sections 18 to 20 are *exceptions* to the general rule that "admissions are admissible in evidence

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[1] *Ali Moidin* v. *Kombi*, 5 Mad. 239.

against the party making them and not against others."

Case. A prisoner indicted for receiving stolen goods asked the police to refer to the list of goods prepared by his wife. Such list was admissible in evidence.[1]

Comment : "Admissions can not be proved by or on behalf of the person who makes them."

21. Proof of admissions against persons making them and not by or on their behalf and their Exceptions.

Admissions are relevant, and *may be proved as against the person who makes them* or his representative in interest; *but they can not be proved by, or on behalf of, the person who makes them*, or by his representative in interest, *except* in the following cases :—

* * *

When can admissions be used or proved by and on behalf of those who make them ? When is an admission by A binding on B ? Can an admission by A be proved in favour of A himself ? If so, when ?

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Section 32.

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body relevant or in issue, *made at or about the time when such state of mind or body existed* and is accompained by conduct rendering its falsehood improbable.

(3) An admission may be proved by or on behalf of the person making it, *if it is relevant otherwise than as an admission.*

When may admissions be proved by or on behalf of the party making them ?

Principle. The admissibility of statements against the person making them is based on the

[1] *Reg* v. *Mallory*, 15 Cox, 456.

theory that *no man makes a statement against his own interest*. But the exceptions to this principle have been introduced from *necessity* on the hypothesis that before the controversy arose the man making the statements had no motive to make false statement in a solemn deed or will or relating to the state of his mind or body.

ILLUSTRATIONS

Admission against the person who made it.

(*a*) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine : B says that it is forged:

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged. But A cannot prove a statement by himself, that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

Exception (1)

(b) A, the captain of a ship, is tried for casting her away : evidence is given to show that the ship was taken out of her proper course :

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by him from day to day and indicating that the ship was not taken out of her proper course. A may prove those statements, because they would be admissible between third parties, if he were dead, under section 32, clause (2).

Exception (1)

(c) A is accused of a crime committed by him at Calcutta : He produces a letter written by himself, and dated at Lahore on that day, and bearing the Lahore post-mark of that day:

The statement in the date of the letter is admissible, because, if A were dead it would be admissible under section 32, clause (2).

(d) A is accused of receiving stolen goods, knowing them to be stolen. He offers to prove that he refused to sell them below their value : Exception (3)

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin which he knew to be counterfeit : Exception (3)

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that, that person did examine it, and told him it was genuine :

A may prove these facts for the reasons stated in the last preceding illustration.

Cases. An admission of a point of law is not binding on the person making it.[1] An oral confession recorded by a Magistrate may be admissible it proved by him and if it is not subject to sections 24, 25 and 26.[2]

"Representatives" include privies in blood, law or estate. The puchaser, at an ordinary auction-sale, is a representative in interest of the judgment-debtor.[3] The purchaser, at such a sale, acquires his title freed from all alienations and incumbrances effected by the debtor subsequent to the attachment of the property sold.[4]

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[1] *Balkrishna*, 4 Bom. L. R. 340

[2] *Feroz* v. *The Crown* (1917), P. R. No. 11 of 1918, Cr.

[3] *Ishan Chunder* v. *Beni Madhub*, 24 Cal. 62 ;

Mahomed Muzuffer v. *Krishna Mohun*, 22 Cal. 909 P. C.

[4] *Dinendronath Sanyal* v. *Ram Coomar*, L. R. 8 I. A. 65

Facts relevant under sections 6 to 13 will not be rendered inadmissible though they may be proved in favour of the person making them.

A statement in a sale certificate as to the amount of rent payable can be used on behalf of the party and against a stranger, if it falls under one of the exceptions to Section 21.[1]

A statement proving pedigree by one of the plaintiffs in a deposition given long before the controversy is admissible in his favour.[2]

The mortgagor's representative in interest is bound by the former's admission of receipt of consideration in the mortgage deed.[3]

A road cess return filed by a temporary leaseholder is admissible in favour of a superior landlord.[4]

22. When oral admissions as to contents of documents are relevant. *Oral admissions* as to the contents of a document are *not* relevant,

State when oral admissions as to contents of documents are relevant. (Ss. 22, 60, 144).

(a) unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or

(b) unless the genuineness of a document produced is in question.

[1] *Ramani Pershad* v. *Narain Sing*, 31 Cal. 880

[2] *Jadunath Sarcar* v. *Mahendranath*, 12 C. W. N. 266

[3] *Behari Lal*, 35 All. 194

[4] 39 Cal. 995 : 39 Cal. 1005

Oral admissions as to the contents of a document are relevant and admissible

(i) when the party proposing to prove them is entitled to give secondary evidence of the contents of such documents under clauses (a), (c) and (d) of Section 65 according to which he is entitled to adduce any secondary evidence including oral admission; or

(ii) when the genuineness of a document produced is in question, i.e., the document produced was identical with the document in question.

Comment: "Oral admissions as to the contents of a document are not relevant." When are oral admissions as to the contents of a document relevant? Is there any difference between Indian and English Law on this point?

English Law. But the English Law admits oral admission of contents of documents even when such documents might have been produced as against the person making the admission.

Case. Admission made by a party as to contents of a document on oath and not in the pleading amounts to a secondary evidence and can not supercede the production of the document itself.[1]

23. Admission in civil cases when relevant. In *civil* cases no admission is relevant,

(a) if it is made either upon an express condition that evidence of it is not to be given, or

(b) under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.

Explanation. Nothing in this section shall be taken to exempt any Barrister, Pleader,

[1] *Shekh Ibrahim* v. *Parvata Hari*, 8 B. H. C. 163

Attorney, or Vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126.

When admission in civil cases is not relevant. On the grounds of *public policy*, the admissions made by the parties in settlement of their disputes are not admissible in evidence, if such admissions are made on conditions that they must not be used as evidence, or when the Court can infer that admissions were made under circumstances from which such condition might be inferred.

Case. Conversations between the parties contemplating that the suit might be instituted are not excluded under this section.[1]

CONFESSIONS

When is a confession relevant in criminal proceedings and when it may not be proved? Give reasons in support of your answer. What are the provisions embodied in the Evidence Act regarding confessions? (Ss. 24 30).

24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceedings. A confession made by an accused is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any *inducement*, *threat*, or *promise*, having reference to the charge against the accused person, proceeding from a person in *authority*, and sufficient, in the opinion of the Court, to give the accused person ground which would appear to him reasonable for supposing that, by making it, he would *gain any advantage* or *avoid any evil of a temporal nature* in reference to the proceedings against him.

Meajan Matbar v. *Alimuddi Mia*, 44 Cal. 130

Sections 24-30 of the Indian Evidence Act appear to lay down the substantive law and sections 164, 364 and 533 of the Criminal Procedure Code lay down the procedure as to confessions.

Discuss the safeguard which the legislature has provided in order to make confessions admissible.

Under what circumstances a confession becomes inadmissible ? A confession becomes inadmissible when it is caused by any inducement, threat, or promise

(a) in reference to the charge against the accused,

(b) proceeding from a person in authority,

(c) giving the accused person reasonable grounds for supposing that by making the confession he would gain any advantage or avoid any evil

(i) of a temporal nature,

(ii) in reference to the proceedings against the accused.

A confession made before a Magistrate or Court in due course of legal proceedings is called *judical*, while a confession made elsewhere is called *extra-judicial*. The latter includes confession of a crime as also admissions and acts of the accused from which the guilt may be implied. But it is to be proved like other facts.

* * *

Distinguish admission from confession.

Admission and Confession distinguished.

(1) Admission is the genus of which confession is a *species*.

(2) Confession is generally used in *criminal cases* to express acknowledgment of guilt or suggestion of criminal intention, while admission is used both in civil and criminal cases.

(3) A statement by the accused person, if not admissible in evidence as a confession, may be used as an *admission*.

(4) Confession always goes against the person making it or against his co-accused if they are jointly tried for the same offence and never on his behalf : but an admission may be used both against him or in his favour in the exceptional cases stated in Section 21.

(5) When a defendant admits the claim in a civil case, he is said to have thereby *confessed judgment.*

State the difference between confession and admission regarding evidentiary value.

(6) A confession, if truly and voluntarily made and satisfactorily proved, may warrant a conviction without any corroboration. Such confession may be made to private individuals or to any Magistrate. It is of the highest value in proof of the guilt of the accused or his criminal intention.

An admission is *prima facie* evience against the person who makes it but he can rebut or explain it away. When admission amounts to an estoppel, it also becomes conclusive.

When is a confession relevant ? A confession is relevant

(i) when it is made after the removal of the impression (s. 28) :

(ii) if it is not made to a police officer (s. 25) : and

(iii) if it is made in the presence of a Magistrate though the accused is in the custody of the Police officer (s. 26).

Confession Defined. A confession is an admission made at any time by an accused person stating or suggesting the inference of his guilt.[1]

The principle on which the evidentiary value of a confession is based is that no indi-

[1] *Queen Empress* v. *Babu Lal*, 6 All. 509, 539 F. B ; *Queen Empress* v. *Nana*, 14 Bom. 260 F. B.

vidual speaks against his own interest unless impelled by gravity of truth or stings of conscience.

Difference between Indian and English Law as to the Proof of Confession. In *England*, the prosecution is to prove that a confession has been freely and voluntarily made. But, in *India*, the defence is to show that the confession was caused by inducement, threat or promise etc and was not made freely or voluntarily. In England when a doubt arises as to the admissibility of a confession, the court has to decide whether it has been proved affirmatively to be free and voluntary. This principle has not been accepted by the Bombay High Court in *Queen Empress* v. *Baswanta*, 25 Bom. 168.

Cases. An admission falling short of being an admission of guilt is not confession.[1] An incriminating statement, though falling short of an absolute confession but suggesting the inference of guilt, is a confession.[2] A confession, proved to be voluntary and geniune, is sufficient to warrant a conviction without corroboration. But, in practice, some corroboration from facts established outside the confession is considered necessary. The confession must be looked at as a whole and not piece-meal.[3] The Court can disregard self-exculpatory statement contained in the confession which is disbelieved.[4] The term "threat" must be sufficient to give the accused grounds for supposing that, by making the confession, he would gain an advantage.[5] The expression "person in authority" does not mean a

[1] *Queen Empress* v. *Jagrap*, 7 All. 646, 648

[2] *Queen Empress* v. *Nana*, 14 B. 260 F. B.

[3] *Queen Empress* v. *Jagrap*, 7 All. 646, 648.

[4] *Queen Empress* v. *Dada Ana*, 15 Bom. 452

[5] *S. N. Mookherjee* v. *Queeu Empress*, 14 B. L. R. 147.

person having control over the prosecution.[1] Deception and inducement by the commanding officer did not make a confession invalid under Section 29.[2] It is for the Judge to decide whether the confession is admissible and it is for the jury to say whether it is true or not.[3]

25. Confession to Police officer not to be proved. No confession made *to a police officer* shall be proved as against a person accused of any offence.

When can confession made by any person while he is in the custody of the Police officer be proved as against such person?

26. Confession by accused while in custody of police not to be proved against him. No confession made by any person *whilst he is in the custody of a police-officer*, unless it be made in the immediate presence of a *Magistrate*, shall be proved as against such person.

Explanation. In this section, 'Magistrate' does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George, or in Burma or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure.

Sections 25 and 26 distinguished. A confession to a *police officer* is not admissible under any circumstance whatsoever (s. 25). A confession to a private individual is always admissible.

[1] *Peg* v. *Nooroji Dadabhai*, 9 B. H. C. 558.

[2] *Emperor* v. *Mohamad*, 8 Bom. L. R. 507.

[3] *Emperor* v. *Kaseri Dayal*, 11 Bom. L. R. 332.

under Section 26; but if such confession is made while the accused is in the *custody of a police-officer*, it is not admissible except when such admission is made in the immediate presence of a *Magistrate* on the ground that the influence of the police-officer is removed by the presence of the Magistrate to whom the accused may safely represent any undue influence brought to bear upon him by the police-officer [1]

Cases under Sections 25 and 26. Sec. 25 excludes confession as *against* an accused But he can prove on his own behalf the confession of a co-accused to a police officer.[2] This section renders the statement of an approver to a police officer inadmissible *against* the accused.[3]

A confession to a police officer is inadmissible even if it is made in the presence of a Magistrate.[4] Admission of a criminating circumstance can not be used against the accused.[5]

27. How much of information received from accused may be proved. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, *as relates distinctly to the fact thereby discovered*, may be proved.

When and to what extent are statements made by the accused to a Police-officer admissible ?

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[1] *Hiran Miya*, C. L. R. 21

[2] *Ebrahim*, 12 Cr. L. R. 79

[3] *King Emperor* v. *Lalkania*, 35 Mad 247.

[4] *Imperatrix* v. *Pandharinath*, 6 Bom 34.

[5] *Queen Empress* v. *Jovecharam*, 19 Bom. 363.

State the law governing the admissibility of confessions in criminal cases. (See sections 27-31).

Statement to a police officer when admissible. An accused may make a confession to a police-officer giving information of circumstances leading to the discovery of any thing or fact verifying the truth of such confession or information. In such a case, it is admissible in evidence e.g. A is accused of theft: he confesses to have committed the theft and to have concealed the things stolen under a tree: this information led to the discovery of the things stolen: here, the confession was to the police and section 25 would have excluded its admissiblity but section 27 makes it admissible on account of the discovery of the things stolen.

Again, A is accused of theft and he makes confession to B, a private individual, while in the police custody: his confession leads to the discovery to the things stolen; though section 26 excludes such evidence, section 27 makes it admissible because the confession or information led to the discovery of the things stolen.

Section 27 is an exception to sections 25 and 26.

Cases. This section makes such part of a confession admissible as leads to the discovery of facts of which the witness gives evidence.[1] The test of admissiblity is "was the fact discovered by the reason of the information and how much of the information was the immediate cause of the fact discovered and as such a relevant fact"?[2] Such information may be received by a police officer or any other person.[3] A confession in detail to enable the Police to discover the property themselves or a confession of such a nature as to require the assistance of the accused in discovering the exact spot where

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[1] *Adu Shikdar* v. *Queen Empress*, 11 Cal. 635.

[2] *Queen Empress* v. *Commer Sahib*, 12 Mad. 153.

[3] *Queen Empress* v. *Babulal*, 6 All. 509, 511, F. B.

the property is concealed is admissible.[1] Only those statements which lead immediately to the discovery of property are admissible.[2] Where two of the prisoners gave certain information to the police which led immediately to the arrest of one of the accused, it was held that the information could be admitted under this section.[3]

28. Confession made after removal of impression. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat, or promise has, in the opinion of the Court, been fully removed, it is relevant.

What effect has promise of secrecy or deception practised upon the accused on the relevancy of confession ?

29. Confession otherwise relevant not to become irrelevant because of secrecy etc. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made

(a) under a promise of *secrecy*, or

(b) in consequence of a *deception* practised on the accused person for the purpose of obtaining it, or

(c) when he was *drunk*, or

(d) in answer to questions which he *need not have answered*, whatever may have been the form of those questions, or

[1] *Queen Empress* v. *Nana*, 14 Bom. 260 F. B.

[2] *Ibid* : *Emperor* v. *Pancham*, 4 All. 198 : *Emperor* v. *Adu Shikdar*, 11 Cal. 635.

[3] *Emperor* v. *Misri*, 31 All. 592 F. B.

(e) because he was not warned that he *was not bound to make such confession*, and that evidence of it might be given against him.

ILLUSTRATION

A is charged with the murder of B He makes a confession-(1) to his wife under a promise of secrecy, (2) to his friend in a state of intoxication, (3) to his religious preceptor under moral exhortation, and (4) to his Attorney for the purpose of his defence These persons are called as witnesses A's confessions to his wife, friend and preceptor are relevant but his confession to his Attorney (legal adviser) is not so (s. 126).

Case. A statement elicited by a question is a confession though such fact may be material on the question of voluntariness [1]

* * *
Can the confession of an accused be used against his co-accused ? What are the conditions under which the confession of an accused may be considered as against his co-accused ?

30. Confession by co-accused When more persons than one are being *tried jointly* for the *same offence*, and a confession made by one of such persons *affecting himself* and some other of such persons *is proved*, the Court *may take into consideration* such confession as against such other persons, as well as against the person who makes such confession.

Explanation "Offence", as used in this section, includes the abetment of, or attempt to commit, the offence

ILLUSTRATIONS.

(a) A and B are jointly tried for the murder of C. It is proved that A said, "B and I murdered C"

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[1] *Barindra Kumar Ghosh* v. *Emperor*, 37 Cal. 467.

The court may consider the effect of this confession against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said, " A and I murdered C".

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried

Scope. This section is an exception to the rule that a confession of one accused is inadmissible against another

'The general rule of English Law is that the confession of an accused person is only evidence against himself and can not be used against others State the exception to this rule as given in the I E Act giving illustrations.

English and Indian Law distinguished. *"The general rule of English Law is that the confession of an accused person is only evidence against himself and can not be used against others".* An exception to this rule has been introduced by section 30 of the I. E. Act and its illustrations.

The *reason* for enacting this exception is that the statement of an accused in a joint trial against himself and his co accused *bears the sanction of an oath and thereby guarantees the truth of such statement.*

How far such a confession may be taken into consideration in convicting the co-accused ?

How far confession of a co-accused may be taken into consideration for the purpose of conviction? Such confession against a co-accused is not a substantive or independent evidence within the meaning of the definition given in section 3 So, no conviction can be had only on such confession [1] But, when there is independent evidence, such confession may be taken into consideration as corroborative evidence to warrant a conviction

Retracted confession According to Bombay, Allahabad and Madras High Courts, a retracted

[1] *Queen Empress* v. *Khandia bin Pandu*, 15 Bom. 66, 67.

confession is admissible as sufficient evidence to convict the accused without corroboration if the Judge is satisfied that the confession made was voluntary and true.[1] So, it is a matter of prudence rather than of law to act upon a retracted confession as a sufficient evidence to warrant a conviction. As regards the other co-accused, although corroborative evidence may be necessary, it is not necessary that such corroborative evidence should by itself be sufficient to support a conviction and that a conviction based on the unsupported evidence afforded by the confession of a co-accused would not be unlawful.

But, according to the Calcutta High Court, it is not safe to convict an accused on his retracted confession standing uncorrborated or to place any reliance on the retracted confession of a co-accused.[2]

Comment on this proposition. What is the evidentiary value of an admission? How does admission operate as against the party making it and why? What is the effect of an "admission"?

31. Admissions not conclusive proof but may estop. *Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels* under the provisions hereinafter contained.

Commentary on the above proposition. The evidentiary value of an admission against the person who made it is that it is only a rebuttable evidence. Such person is entitled to show that he made the statement under some mistake and that it was not true. But the admission becomes conclusive evidence against the person making it if it amounts to an estoppel as defined in sections 115-117.

When a person makes a statement he is bound to make it good unless and until he can explain it

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[1] *Emperor* v. *Kehri*, 29 All. 435: *Emperor* v. *Gangia*, 23 Bom. 316 *Emperor* v. *Raman*, 21 Mad. 63.

[2] *Queen Empress* v. *Jadab Das*, 27 Cal. 295.

away by proving the true state of facts to the satisfaction of the court. But when his statement works to the prejudice of another to whom the statement was made, he is not entitled to resile from his position.

When admission amounts to an estoppel. When the person to whom such admission was made has, by acting upon such admission, been prejudiced so as to part with his property or change his position, the admission amounts to an estoppel.

When does an admission amount to an estoppel? (cf. Sec. 17, 115)

An admission operates as rebuttable evidence and its maker may contradict it. But it becomes irrebuttable or it may amount to an estoppel as defined in section 115 when it is acted upon by the person to whom it it is made. Such is also the law *in England*.

An admission is receiveable in evidence without the sanction of an oath or test by cross examination. It is not conclusive proof. Its evidentiary value is to be determined by the Judge. An admission is an exception to the rule that hearsay is no evidence. It depends on the principle that a person does not declare against his own interests. It is taken in its entirety and not piece-meal.[1]

Admission and Estoppel distinguished. An admission, when it amounts to an estoppel, is conclusive against the maker and his privies. A stranger cannot, as a rule, take an advantage of it. An estoppel is only a rule of evidence, because an action cannot be founded upon it. It becomes a substantive law when it is urged in defence. An admission, unless explained away, may be a sufficient proof of a fact without corroboration.[2]

[1] *Tara Prasad* v. *Dwarka Nath*, 15 W. R. 451.

[2] *Maund Mya* v. *Ma Tha Ya*, 24 B. R. 377.

Is there any difference as to the effect of evidence in civil and criminal proceedings?

Differences as to the effect of evidence in Civil and Criminal proceedings. There are some sections of the I. E. Act which refer to confessions which do not apply to civil cases and there are some sections in that Act which deal with questions of estoppels which do not apply to criminal proceedings. In appreciating evidence, a criminal court has to become morally certain as to the guilt of the accused person and it has to acquit the accused when there is any doubt. But, in civil cases, the court has to balance the evidence and to decide the matter before it in favour of the side on which the balance preponderates

Case A party is not bound by an admission on a point of law[1]

Statements by persons who can not be called as witnesses.

* * *

Under what circumstances and whose statements of relevant facts are admissible in evidence under Section 32 of the Act?

When are statements of relevant facts made by a deceased person admissible in evidence?

32. Cases in which statement of relevant fact by person who is dead or can not be found etc is relevant Statements, written or verbal, of relevant facts, made by a person who is *dead*, or who *can not be found*, or who has become *incapable of giving evidence*, or whose attendance can not be procured without an amount of *delay or expense* which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:—

(1) When the statement is made by a person as to the *cause of his death*, or as to any of the circumstances of the transaction which resulted in his death, in cases in which

[1] *Jutlendromohun* v. *Ganendromohun*, L. R. *Sup.* I. A. 47; *Jagwant* v. *Silan*, 21 All. 287.

the cause of that person's death comes into question.

Such statements are relevant, whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) When the statement was made by such person *in the ordinary course of business*, and, in particular, when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty, or of an acknowledgment written or signed by him of the receipt of money, goods, securities, or property of any kind; or of a document used in commerce, written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.

(3) When the statement is *against the pecuniary or proprietary interest of the person making it*, or when, if true, it would expose him, or would have exposed him, to a criminal prosecution, or to a suit for damages.

(4) When the statement *gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest*, of the existence of which, if it existed, he would have been

likely to be aware, and when such statement was made before any controversy as to such right, custom, or matter had arisen.

(5) When the statement relates to the *existence of any relationship* 'by blood, marriage, or adoption', between persons as to whose relationship 'by blood, marriage, or adoption', the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) When the statement relates to the existence of any relationship 'by blood, marriage, or adoption' between persons deceased, and *is made in any will or deed relating to the affairs of the family* to which any such deceased person belonged, or in any family-pedigree, or upon any tomb stone, family-portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) When the statement is contained in any deed, will or other *document which relates to any such transaction as is mentioned in section 13, clause (a).*

(8) When the statement was *made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.*

ILLUSTRATIONS

"Evidence may be given of statements made by a person who could not actually be called before court." Give two illustrations.

(a) The question is, whether A was murdered by B ; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B ; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow :

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth :

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day :

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day :

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondants in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour is a relevant fact.

(e) The question is, whether rent was paid to A for a certain land :

A letter from A's deceased agent to A, saying that he had received the rent on A's account, and held it at A's orders is a relevant fact.

(f) The question is, whether A and B were legally married :

The statement of a deceased clergyman, that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who can not be found, wrote a letter on a certain day :

The fact that a letter written by him is dated on that day is relevant.

(h) The question is, what was the cause of the wreck of a ship :

A protest made by the captain whose attendance cannot be procured is a relevant fact.

(i) The question is, whether a given road is a public way :

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what is the price of grain on a certain day in a particular market :

The statement of the price made by a deceased banya in the ordinary course of business is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B :

The statement by A that B was his son is a relevant fact.

(l) The question is, what was the date of the birth of A :

A letter from A's deceased father to a friend announcing the birth of A on a given day is a a relevant fact

(m) The question is, whether and when A and B were married :

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character.

The remarks of a crowd of spectators on these points may be proved.

Sections 32 and 60. Section 32 is one of the exceptions to section 60 which requires that oral evidence must be direct which means that hearsay evidence is not admissible. The Evidence Act did not use the phrase 'hearsay evidence' because it is inaccurate and vague.

Section 32 analysed.

1. *Persons whose statements are relevant* under this section :—

(a) Who is dead :

(b) Who can not be found .

(c) Who has become incapable of giving evidence :

(d) Whose attendance can not be procured without unreasonable delay or expense.

2. *Circumstances under which their statements are relevant* :—

(i) When it relates to cause of death :

(ii) When it is made in course of business .

(iii) When it is made against the interest of the maker :

(iv) When it gives opinion as to public right or custom or matters of general interest :

(v) When it relates to existence of relationship ;

(vi) When it is made in a will or deed relating to family affairs :

(vii) When it is in a document relating to a transaction mentioned in section 13, clause (a):

(viii) When it is made by several persons and expresses feelings relevant to matter in question.

* * *

Define "dying declaration". Enumerate the grounds on which dying declarations are admitted in evidence. When are dying declaration relevant ? Is there any difference between English and Indian Law ?

Dying declaration defined. A *dying declaration* is a statement made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death. A dying declaration, in order to be a substantive evidence, requires that the person who made the declaration died before the question of his death becomes relevant in a proceeding.

When is a dying Declaration relevant ? A dying declaration is relevant when

(a) it refers to the cause of the death of the deceased or to any of the circumstances which resulted in his death :

(b) death must have actually ensued :

(c) the fact of the declarant's death comes into question : and

(d) it is reduced into writing and used to refresh the memory of a witness.

What is the law as to the admissibility of a dying declaration in India ? How does it differ

Dying declarations—English and Indian Law Compared.

(1) In English Law, a dying declaration is not relevant unless the declarant was a competent witness.

But it is not so in Indian Law.

(2) In English Law, a person making the declaration

(a) must have been in actual apprehension of his immediate death at the time of making the declaration,

(b) must have been fully aware of his danger, and

(c). must have died.

from that in England ? State which in your opinion is the sounder law giving reasons for your opinion.

But, in Indian Law, the condition (a) is not necessary.

(3) In English Law, a dying declaration is admissible when the charge is of homicide and the circumstances resulting in death form the subject of declaration.

But, in Indian Law, a dying declaration is admissible both in civil and criminal cases.

If the person making the declaration chances to live his statement, though not admissible as a dying declaration under section 32, may be admissible under some other section, such as section 157 of the I. E. Act.

In England, if a person does not acknowledge an absolute divine power capable of punishing perjury, he is not a competent witness. In India, if the court thinks that a person has intelligence enough to give an intelligent answer to any question, he is competent. According to the Bombay and Calcutta High Courts, evidence of a witness who has not administerd an oath is admissible The Allahabad High Court has taken a contrary view. The Madras High Court has recently accepted the view of the Calcutta High Court. The majority of the Indian High Courts appears to have the rational view as to the competency of witnesses. The English Law is not based on any rational principle.

But the Indian Evidence Act is based on the rational principle. So, a dying declaration is admissible in evidence both in civil and criminal cases.

S was attacked and injured on the 28th May, 1908. On the 29th, he went to Alipore and lodged a petition of complaint before the Magistrate who examined him on oath, recording his statement in compliance with the provision of Section 200 of the Criminal Procedure Code, and sent him to Hospital where he died on the 31st. Can the petition of complaint and the statement recorded by the Magistrate be treated as dying declarations, are they admissible in evidence as dying declarations, and is oral evidence admissible to prove the statement recorded by the Magistrate having regard to Section 91 of the Evidence Act. *Answer.* If the person making the declaration did it before the question as to his death is raised in any proceeding, the statement in the petition and that recorded by the Magistrate are admissible in evidence as dying declarations. Oral evidence is admissible to prove the statements recorded by the Magistrate and Section 91 of the I. E. Act is not applicable to this case in as much as the Magistrate, according to the proviso (a) to Section 200 of the Criminal Procedure Code, was not required to record the statements of the deceased when his complaint embodied in his petition was before the Magistrate. Unless the matter is required by law to be reduced to the form of a document, section 91 has no application.

A dying declaration is admitted in evidence on two *grounds*, viz,

(a) By *virtue of necessity*. The declarant who might be the principal witness being dead, demand of justice justifies his declaration made as to the cause of his death a relevant fact.

(b) The declarant being in contemplation of death and mortally wounded, his statement

(declaration) has the *sanction of an oath* as to the truth of what he said.

If a person making a dying declaration happens to live, what is its evidentiary value ? *Answer.* If the declarant does not die, his declaration can not be called a dying declaration and can not be used in evidence as a substantive evidence under Section 32, but it can be used as a corroborative evidence under Section 157.

Clause 2. The *principle* of this exception is that entries made in the ordinary routine of duty are presumably correct since the process of invention implies *trouble*, such entries usually form a *link* in the chain of circumstances which mutually corroborate each other, false entries would *disgrace* the writers and such entries are subject to *inspection* of several persons.

Under the *English Law*, the party making the entry should have a personal knowledge of the facts he enters (*Price* v. *Torrington* 1. Sm. L.C. 352). But the *Indian Evidence Act* requires that such entries should be regularly kept in the ordinary course of business. The want of knowledge of the person making the entries may detract the value of the evidence but not their admissibility (*Reg* v. *Hanmanta*, 1 Bom. 610). Again, the *English Law* requires that the entries must be proved to have been made contemporaneously with the facts which they relate. But, the *Indian Evidence Act* does not require such restriction.

Problem. In an action for goods sold and delivered a book is put in containing an account of the goods delivered by the plaintiff's day-man, which it was his duty to sign daily. Objection is taken on the ground of not calling the day-man, who died during the pendency of the suit but before trial. Discuss, giving reasons, admissibility (a) of the book, (b) of the entries signed by the deceased.

Answer. (a) Under section 39, only so much of a statement or a portion of the book as contains the entries in reference to the matters in issue as to the sale and delivery of the goods is admisssble in evidence. The whole book is not admissible in evidence. (b) But the entries in the book relating to the sale and delivery of the goods are admissible in evidence on proof that the books were kept and the entries were made in the ordinary course of business.

* * *

Explain what in the Evidence Act are the exceptions to the general rule "Hearsay evidence is not admissible." State the exceptions to to the rule excluding second-hand evidence.

Give reason for the rule "Hearsay evidence is not admitted." State any exceptions to them that you know.

Exceptions to the rule against Hearsay.

It may be divided into oral and documentary. Section 60 requires that oral evidence must in all cases whatever be direct: section 61 requires that the contents of documents may be proved either by primary or secondary evidence: section 64 requires that documents must be proved by primary evidence except in the cases mentioned in section 65 and other subsequent sections. In clauses (a), (c), (d) of section 65, any secondary evidence including oral evidence is admissible. From the above, it is evident that sections 17-39 are exceptions to sections 60 and 61. Of the sections 17-39, sections 17-31 refer to the statements made by the parties and they may be used for or against them under different circumstances. But sections 32-39 refer to statements made by strangers or third parties and they are admissible for or against the whole world. The Indian Evidence Act does not speak of hearsay (second-hand or derived) evidence but sections 60-65 deal with hearsay evidence which, according to these sections, are not admissible as a general rule, and sections 17-39 which deal with the exceptions to such general rule (see section 60).

(1) Sections 18-20 make admissions relevant against a party making them or not questioning the

accuracy of statements made in his presence and his confession.

Give some exceptions in the I. E Act to the rule excluding hearsay.

(2) Sections 32 and 33 make statements of dead persons or persons incapable of attending court relevant.

(3) Sections 34-39 make statements contained in books of accounts and public records admissible.

When is hearsay evidence admissible ?

Hearsay. The word "*hearsay*" is sometimes used to denote irrelevant evidence or a thing heard. But, in the I. E. Act, it means whatever a person declares on informations given by some one else. A hearsay evidence may be defined as a statement made by a witness in Court of what he heard from another out of Court.

What is hearsay evidence

Why is hearsay evidence admissible? Sections 17-38 making the hearsay evidence admissible are based on the principle that the statements or admissions of persons interested are generelly made in consultation with their own interests and also in declaration of facts of which truth were not in controversy when such declarations were made.

Why is hearsay evidence admissible ?

As no better evidence is available, hearsay evidence in sections 17-39 has been made admissible on the principle of *necessity* in the interest of justice.

Lis mota means the commencement of the controversy and not the commencement of the suit.

Cases.—*Clause 1.* Evidence to prove the questions put to the deceased as to her injuries and the sign made by her being unable to speak was admissible.[1] The dying declaration of a person that he had committed the murder was not admissible against another charged with the murder.[2] A "*dying declaration*" can not be treated as a

Write notes "Lis mota."

[1] *Queen Empress* v. *Abdulla*, 7 All. 385, 397 (F. B.)

[2] *Fakir* v. *Empress*, P. R. No. 17 of 1901, *Cr.*

deposition unless made in the presence of the accused and before a Magistrate.[1] A dying declaration not taken down in the presence of the accused but proved by a witness who deposed that it was recorded by a Magistrate and read over to the deceased who admitted its correctness was admissible.[2] A dying declaration recorded not by a committing Magistrate must be proved by him.[3] A dying declaration recorded by a Magistrate must be proved.[4] A dying declaration elicited by leading questions and earnest solicitations is admissible.[5] The evidence of one of the two witnesses examined by the enquiring Magistrate in a case of grievous hurt was admissible under clause (1) of section 32 or under section 33 at the Sessions trial notwithstanding the charges of murder and culpable homicide not amounting to murder were added at such trial after the death of such witness of the injuries he received in the assault constituting the grievous hurt.[6] A statement of a person not called as a witness at proper time was not admissible although subsequently dead.[7] A statement of a witness not called to prove a fact in issue is not admissible although it is a relevant fact.[8] The scope of the section is to secure the best evidence possible in the circumstances of the case.[9] A dying declaration was made on the 13th August as to his wounds inflicted by the accused in committing dacoity and he died on 20th August. There was

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[1] *Empress* v. *Samiruddin*, 8 Cal. 211.

[2] *Emperor* v. *Balaram Das*, (1921) 49 Cal. 358.

[3] *Reg* v. *Fata Adaji*, 11 Bom. H. C. 247, 248.

[4] *Ghazi* v *The Crown*, P. R. No. 17 of 1911, *Cr*

[5] *Queen Empress* v. *Abdulla*, 7 All. 385, 398 (F B.)

[6] *Empress* v. *Rochia Mohato*, 7 Cal. 42.

[7] 25 All. 143.

[8] *Patel Vandravan*, 15 Bom. 565.

[9] *R. D. Sethna*, 9 B. L. R. 1047.

no evidence to prove that the death was caused or accelerated by the wounds. The declaration was not admissible.[1]

Clause 2. The *'business'* refered to in section 32 may be of temporary character.[2] The phrase, 'in the ordinary course of business', means the current routine of business followed by the declarant.[3] The entries should have been made by the deceased person himself and not by another at his dictation.[4] The entries relevant only under section 34 are not alone sufficient to charge a person with liability without corroboration. But, if they are relevant under section 32, they may be sufficient evidence without corroboration. But a Judge should exercise his discretion in requiring such corroboration or not.[5]

Clause 3. Declarations are relevant though the declarant had no personal knowledge of the facts stated therein.[6] Under the *English Law*, a statement which would have exposed the declarant to a criminal prosecution is not admissible. A deed of heirship executed by a Hindu widow in favour of plaintiff's father in respect of her husband's property was admissible.[7]

Clause 4. Public rights are those rights which are common to all members of the state. *General rights* affect only a considerable section of the community. The personal knowledge of the decla-

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[1] *Queen Empress* v. *Rudra*, 2 B. L. R. 331.

[2] *Sheonandun* v. *Jeonandun*, 13 C.W. N. 71.

[3] 11 I. C. 854.

[4] *Mussamat Naina Koer* v. *Gobardhan*, 2 P. L. J 42.

[5] *Rampyarabai* v. *Balaji Shridhar*, 28 Bom. 294. (c. f. *Dwarka Das* v. *Santa Bakhsh*, 18 All. 92).

[6] *Crease* v. *Barreth*, 1 C. M. & R. 919.

[7] *Hari Chintaman* v. *Moro Lakshman*, 11 Bom. 89.

rant is necessary under this clause. Rights of a private individual against the public does not come under this clause.[1] 'A statement before any controversy had arisen' means that it should be made before the beginning of any controversy (*ante litem motam*) and not simply before the commencement of the suit.[2] Clause 4 is applicable to the case where the statement as to custom or right is merely a relevant fact and not a fact in issue.[3]

Clause 5. According to *English Law*, a certain degree of relationship is necessary to make such statements admissible.[4] But this Act requires only the existence of any special knowledge of the relationship on the part of the declarant. This clause has no application in proof of marriage in cases of bigamy, adultery and enticing away a married woman.[5] The statement in a geneological table filed by a member of the family is relevant if it is filed before the controversy.[6] A pedigree received by a descendant from his grandfather is admissible without showing who had made the statements constituting the pedigree.[7] Statement of a competent witness in support of a pedigree which he heard recited by members of the family on ceremonial occasions is admissible.[8] Hearsay evidence in proof

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[1] *Heiniger* v. *Droz*, (1900) 3 Bom. L. R. 1; 25 Bom. 433.

[2] *Kalha Prasad* v. *Mathura Prasad*, 30 All. 510 P. C.

[3] *Patel Vendravan* v. *Patel Manilal*, 15 Bom. 565.

[4] *Empress* v. *Pitambur Singh*, 5 Cal. 566 (F. B.)

[5] Ibid.

[6] *Shymanand* v. *Rama Kanta*, 32 Cal. 6.

[7] *Jahangir* v. *Sheoraj*, (1915) 37 All. 600.

[8] *Debi Pershad* v. *Radha*, 32 Cal. 84 P. C.

of a pedigree is not admissible in proof of birth, marriage and death constituting the pedigree.[1]

Clause 6. A pedigree table produced from a collateral relation is not admissible to prove inheritance when the statements in it are not proved by such collateral relation.[2] A family pedigree prepared by the family chronicler from the information supplied by family members is admissible under this clause and clause 2.[3]

Clause 7. This clause includes rights both public and private. Under the English Law, evidence of reputation is not admissible in cases of private right. Under this clause the statement of any relevant fact contained in a deed or will or other document relating to a transaction referred to in section 13, though not more than 30 years old, will be admissible.

Clause 8. A witness may repeat on oath a common statement made by persons assembled to express their feelings at any occurence.[4]

When is evidence given by a witness in a prior judicial proceeding relevant ?

33. Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated. Evidence given by a witness in a judicial proceeding, or before any person authorised by law to take it, is relevant for the purpose of proving in a *subsequent judicial proceeding*, or in a *later stage of the same judicial proceeding*, the truth of the facts which it states, when the witness

Under what circumstances is a deposition of an absent

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[1] *Bipin Behari* v. *Sreedam*, 13 Cal. 42.

[2] *Surjan* v. *Sardar*, 23 All. 72 P. C.

[3] *Mohan Sing* v. *Dalpat Sing*, (1921) 24 Bom. L. R. 289.

[4] *Queen* v. *Ram Dutt*, 23 W. R. (Cr.) 35, 38.

witness admissible ? Enumerate the case in which evidence not taken by the Court trying a case can be put in. When is the deposition of a witness in a prior judicial proceeding relevant in a subsequent proceeding ?

(a) is dead, or

(b) cannot be found, or

(c) is incapable of giving evidence, or

(d) is kept out of the way by the adverse party, or

(e) if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable.

Provided,

(i) that the proceeding was between the *same parties* or their representatives in interest ;

(ii) that the adverse party in the first proceeding had the *right and opportunity* to cross-examine ;

(iii) that the *questions in issue* were substantially the *same* in the first as in the second proceeding.

Explanation. A criminal trial or inquiry shall be deemed to be proceeding between the prosecutor and the accused within the meaning of this section.

This section is also an exception to the rule that hearsay evidence is not admissible.

Cases. Evidence of a witness in a proceeding subsequently pronounced as not a judicial proceeding is not admissible.[1] The depositions of witnesses given in a counter-case could be evidence against

[1] *Ramai Reddi*, 3 Mad. 48, 51.

the person making them.[1] All the objections which might have been raised if the witness himself had been present during the trial may be raised when his deposition in a former proceeding is tendered. The deposition of a witness, who was simply summoned but no warrant was issued for his arrest, can not be used as evidence.[2] Section 512 of the Criminal Procedure Code which authorises the Court to record evidence in the absence of the absconding accused is an exception to this section. A temporary incapacity of a witness to give evidence is an incapacity within the meaning of section 33.[3] Only in extreme cases of expense or delay, the personal attendance of a witness is dispensed with.[4] It is not necessary that the adverse party should have exercised his right of cross-examination. It is sufficient if he had an opportunity for the same.[5] The deposition of a witness recorded in a case of criminal trespass is admissible in a suit under Section 9 of the Specific Relief Act in respect of the land which forms the subject-matter of criminal trespass provided the witness is proved to have since died.[6] The deposition of a witness recorded in a criminal inquiry in respect of a grievous hurt was admissible in evidence under section 32, clause 1, or this section notwithstanding that additional charges of murder and culpable homicide not amounting to murder were added in the Sessions Court.[7]

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[1] *Queen Empress* v. *Ganu Sonba*, 12 Bom. 440.

[2] *Dost Muhammad* v. *King Emperor*, (1905) 2 A. L. J. 599.

[3] *Empress* v. *Asgur Hossein*, 6 Cal. 774.

[4] *Empress* v. *Mulu*, 2 All. 646.

[5] *Queen Empress* v. *Ram Chandra*, 19 Bom. 749.

[6] *Foolkissory* v. *Nabin Chunder*, 23 Cal. 441.

[7] *Empress* v. *Rochia*, 7 Cal. 42.

In what special circumstances are statements in writing of living persons not parties to a suit admissible in evidence without their being called ? What are the conditions under which an entry in an official book or register stating a fact in issue becomes a relevant fact ? What is the evidentiary value of an entry in a man's account book in support of his claim. Are entries in books of account alone sufficient to charge any person with liability ? When do they require corroboration as a matter of law and when not ?

Statements made under special circumstances.

34 Entries in books of account when relevant. Entries in books of account, *regularly kept* in the course of business, are relevant whenever they refer to a matter into which the court has to inquire, but *such statements shall not alone be sufficient evidence to charge any person with liability.*

ILLUSTRATION

A sues B for Rs. 1,000 and shows entries in his account books showing B to be indebted to him to this amount.

The entries are relevant but not sufficient, without other evidence, to prove the debt.

A matter into which the Court has to inquire—means a matter in issue

When entries require corroboration. The entries which are relevant under section 34 require corroboration. But the entries relevant under section 32, clause(2), do not require any corroboration because they are substantive evidence sufficient by themselves to warrant a decision. If, in a case, the entries are relevant under both the sections, no corroboration is necessary.

Cases. Entries in account books made by one at intervals at the dictation of another is admissible.[1] The Calcutta High Court held that entries are not restricted to those made from day to day or from hour to hour[2] Entries in an account book

[1] *Munchershaw* v. *New Dhurumsey Co*, 4 Bom. 576.

[2] *The Deputy Commissioner of Bara Banki* v. *Ram Parshad*, 27 Cal. 118 P. C.

are corroborative of the testimony to the fact of a payment of debt[1]. Entries in an account book regularly kept in the course of business are admissible though the persons who had personal knowledge of their truth did not make or dictate them[2]. A witness can refresh his memory from an account book regularly kept[3]. The proper procedure to prove acccunts is to call the clerk who has kept the account or one who can say that they were regularly kept and they were generally genuine and accurate[4]. Entries without corroboration can not charge the persons with liability[5]. But such entries being relevant under section 32, clause(2), are sufficient in themselves to charge the person with liability[6].

35. Relevancy of entry in public record, made in performance of duty. An entry in a public or other official book, register, or record, stating a *fact in issue* or *relevant fact*, and made

(a) by a public servant in the discharge of his official duty, or

(b) by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept,

is itself a relevant fact.

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[1] *Ibid.*

[2] *Reg* v. *Hanmanta*, 1 Bom. 610.

[3] *Bhog Hong Kong* v. *Ramanathen Chetty*. (1902) 29 Cal. 334. P. C.

[4] *Hingi May*, 84 I. C. 41.

[5] *Hira Bhagat* v. *Govind Ram*, P. R. No. 63 of 1897 ; 18 All. 927.

[6] *Rampyarabai* v. *Balaji Shridhar*, (1904) 6 Bom. L. R, 50 ; 28 Bom. 294.

Cases. Section 35 presumes that the public officers discharge their duties with accuracy and fidelity. So a certified copy of entries in a register kept by a public servant under the law is admissible[1]. Such entry must have been made in the discharge of an official duty[2]. Delay in making such entries impair credibility in English Law which speaks only of official registers or books. A recital in a judgment not *inter partes* is not admissible[3]. Entries in a public register kept in the Survey Office under the sanction of official duty are relevant[4]. A register of Mahandari villages prepared by the Revenue Surveyor is admissible[5]. Statement of a witness recorded by a police-officer under section 16, Criminal Procedure Code, is not admissible[6].

36. Relevancy of statements in maps, charts and plans. Statements of *facts in issue or relevant facts*, made

(a) in published maps or charts *generally offered for public sale*, or

(b) in maps or plans *made under the authority of Government*,

as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

In what cases are statements in maps, charts and plans relevant under section 36 of the I. E. Act? State briefly the provisions.

[1] *Shoshi Bhooshun* v. *Girish Chunder*, 20 Cal. 940; *Rai Bha Ya* v. *Beni Mahto*, (1917) 20 Bom. L. R. 712, P. C.

[2] *Samar Dasadh* v. *Juggal Kishore*, 23 Cal. 366.

[3] *Seethapati Rao Dora* v. *Venkanna Dora*, (1922) 45 Mad. 332.

[4] *William Graham* v. *Phanindra*, 19 C.W.N. 1038.

[5] 20 Bom. L. R. 712 P. C. = 22 C. W. N. 439.

[6] *Isab Mandal*, 5 C. W. N. 65.

of the I. E. Act with reference to maps, plans or charts.

Under the authority of Government means Government as Sovereign power and not Government as holding an estate (*Khas-mahal*). Any map, chart or plan made for a particular purpose under the authority of Government or for private purposes or for the purpose of any particular suit by a Government officer are not relevant under this section, because they are not made under the authority of Government.

Cases Published maps generally offered for sale and maps prepared under the authoriry of Government are presumed to be accurate. Survey maps are relevant to evidence possession on the date of survey[1]. Maps and surveys made in India for Revenue purposes are valuable evidence of the state of things at the date on which they were made[2]. But the map made by the Government for a private purpose is not admissible under this section or under section 83 without proof of its accuracy[3]. Topographical survey maps are evidence of possession at the date when the maps were made[4]. A statement in a thak map that it was prepared in the presence of the representatives of certain parties is admissible in evidence[5].

37. Relevancy of statement as to fact of public nature contained in certain Acts or Notifications. When the Court has to form an opinion as to the existence of any

[1] *Novakumar* v. *Govind Chunder*, 9 Cal. 305.

[2] *Jagadindra Nath*, 30 Cal. 291, P. C.; *Mirza Shamsher*, 12 C. W. N. 273.

[3] *Kanto Prashad Hazari* v. *Jagat Chandra Dutta*, 23 Cal. 335.

[4] 11 C. W. N. 230.

[5] 10 C. L. J. 527.

fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor-General of India in Council, or of "any other legislative authority in British India constituted for the time being under the Indian Councils Act, 1861, the Indian Councils Acts, 1861 and 1892 or the Indian Councils Acts, 1861 to 1909", or in a notification of the Government appearing in the Gazette of India or in the Gazette of any Local Government, or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact.

Comment. Statutes and state papers are relevant to prove any fact of a public nature and they are conclusive evidence. Section 72 includes them in public documents. Section 77 describes what public documents are to be proved by certified copies and section 78 describes the public documents which may otherwise be proved.

38. Relevancy of statements as to any law contained in law-books. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

Comment. Laws of a foreign country may be proved by reference to books containing such laws provided they have been printed and published under the authority of Government.

Under the English law, a professional man or official has to prove law of a foreign country and he may refer to text books, decisions and statutes. Section 45 of this Act also allows the opinion of an expert to prove foreign laws.

How much of a Statement is to be proved.

39. What evidence to be given when Statement forms part of a conversation etc. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given *of so much*, and no more, of the statement, conversation, document, book, or series of letters or papers as *the Court considers necessary* in that particular case to the full understanding of the *nature* and *effect* of the statement, and of the *circumstances* under which it was made.

Case. The court may allow the accused to see so much of the police diary as is necessary to the full understanding of a particular matter of such diary used by the police officer to refresh his memory or which the court has used to contradict such officer.[1]

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[1] *Queen Empress* v. *Mannu*, 39 All. 390, 405.

Judgments of Courts of Justice when relevant.

Explain and illustrate "Judgments inter partes." Under what circumstances are former judgments and decrees relevant in subsequent suits or criminal prosecutions? Is the judgment of a Court refusing probate a judgment *in rem*? If so, why? If not, why not? (Sec. 40-43)

40. Previous judgments relevant to bar a second suit or trial. The *existence of any judgment, order or decree,* which, by law, *prevents* any Court from taking cognisance of a suit, or holding a trial, is a relevant fact, when the question is whether such Court ought to *take cognisance* of such suit, or to *hold such trial.*

Judgment inter partes. It means judgment, decree or order between the same parties of a matter in dispute between them decided by a competent Court. Such judgment is called *res judicata* (See section 11, Civil Procedure Code). The principle of *res judicata* applies to Criminal Courts as well. The plea of *autre fois convict or autre fois acquit* (Sec 403, Criminal Procedure Code) is based on this principle. But a judgment in a criminal case does not operate as *res judicata* in a civil suit.

Case. The judgment dismissing a suit for money was admissible in the Criminal case initiated by the plaintiff charging the defendant with a criminal breach of trust in respect of the money forming the subject-matter of the suit.[1]

See Commentaries under section 43.

Sections 40-43 are exceptions to the rule that transactions unconnected with the facts in issue are inadmissible.

[1] *In re N. F. Markur* (1914) 18 Bom. L. R. 185.

41. Relevancy of certain judgments in probate, etc, jurisdiction. A final judgment, order or decree of a competent Court in the exercise of (i) *probate*, (ii) *matrimonial*, (iii) *admiralty*, or (iv) *insolvency* jurisdiction, which

State and illustrate the rule as to the relevancy of judgments *in rem* embodied in Section 41.

(a) confers upon, or takes away from, any legal character, or

(b) declares any person to be entitled to such character, or to be entitled to any specific thing, not as against any specified person, but absolutely,

is relevant when the existence of any such legal character, or the title of any such person to any such thing is relevant.

Such judgment, order or decree is conclusive proof—

(m) that any legal character which it confers accrued at the time when such judgment, order or decree came into question ;

(n) that any legal character, to which it declares any such person to be entitled, accrued, to that person at the time when such judgment, "order or decree" declares it to have accrued to that person ;

(o) that any legal character which it takes away from any such person ceased at the time from which such judgment, "order or decree" declared that it had ceased or should cease ; and

(p) that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, "order or decree" declares that it had been or should be his property.

Illustration. A sues for probate of the will left by B. C opposes A alleging that the will was a fabrication. The Court finds that the will was genuine and grants the probate. In a proceeding between parties who were no parties tc the probate case, the judgment in the probate case is conclusive.

Distingeish between a judgment *in rem* and a judgment *in personam* for the purposes of the Indian Evidence Act. Discuss the admissibility of such judgments respectively as evidence.

Judgment in rem and judgment in personam. A judgment *in rem* means that it is conclusive and admissible in evidence against all the world, but a judgment *in personam* binds only the parties and their privies. Section 40 is an example of a judgment *in personam,* while section 41 is an illustration of a judgment *in rem* only in respect of such matters for which it is declared to be conclusive. In respect of other matters for which it does not declare to be conclusive, it is admissible only between the parties and operates as judgment *in personam.* A judgment under section 40, being *inter partes,* operates as *res judicata* between the parties. Such judgments passed on contracts and torts operate only as judgments *in personam.* A judgment passed under Section 41 operates against the whole world when it declares or confers a legal character or takes it away or declares any right belonging to any person.

Write notes on : "Judgment *in rem*"

This section is based on the ground of public policy that the social relations shall be solemnly adjudicated and that thereafter shall remain, once for all, at rest. Judgments *in rem* are conclusive of the legal character conferred on, or taken away from, a person who is declared to be entitled to or not to such character.

Cases. A judgment of a Probate Court refusing probate is as much a judgment *in rem* as one which

grants probate.[1] But, in *Kallyanchand Lalchand* v. *Sitabai*[2], it was held that section 41 did not apply to a judgment refusing probate and the only kind of negative judgment contemplated by the section is that which takes away existing legal character.[3] The judgment in a probate case operates as *res judicata* between the parties under Section 83 of the Probate and Administration Act (V of 1881) and Section 11 of the Civil Procedure Code.

42. Relevancy and effect of judgments, orders, or decrees, other than those mentioned in sec. 41. Judgments, orders or decrees, other than those mentioned in Section 41, are relevant if they relate to matters of a public nature relevant to the inquiry ; but such judgments, orders or decrees are not conclusive proof of that which they state.

ILLUSTRATION

A sues B for trespass on his land : B alleges the existence of a public right of way over the land which A denies :

The existence of a decree in favour of the defendant, in a suit by A against C for trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

Cases A judgment *in rem* in a criminal case is not a matter of a public nature and is not

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[1] *Chinnasamy* v. *Hariharabadra*, 16 Mad. 380.

[2] 38 Bom. 309 ; 16 Bom. L. R. 5, F. B.

[3] c. f. *Lalit* v. *Radharaman*, (1911) 15 C. W. N. 1021.

admissible in civil proceedings.[1] Judgments not *inter partes* are admissible to explain the nature of possession, or to throw light on the motives or conduct of parties or to identify property.[2] Judgments may be admissible to prove transactions or particular instances.[3] A judgment in a criminal case can not be used in evidence in a civil case to prove the truth of the facts upon which it is rendered and *vice versa*.[4]

Discuss the question whether a previous judgment not between the same parties, not being a judgment *in rem*, and not relating to matters of a public nature is at all admissible in evidence.

43. Judgments &c. other than those mentioned in sections 40 to 42, when relevant. Judgments, orders or decrees other than those mentioned in Sections 40, 41 and 42, are irrelevant unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.

ILLUSTRATIONS

(a) A and B separately sue C for a libel which reflects upon each of them. C, in each case, says that the matter alleged to be libellous is true and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification. The fact is irrelevant as between B and C.

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[1] *Bishen Das* v. *Ram Labhaya*, (1915) P. R. No. 106 of 1915.

[2] *Lakshman* v. *Amrit*, 24 Bom. 591, 598, 599.

[3] *Muhamad* v. *Husan*, 31 Bom. 143 (c.f. 7 C. W. N. 574 ; 20 C. W. N. 643).

[4] *Raj Kumari* v. *Bama Sundari*, 23 Cal. 610 ; Ram Lal, 4 All. 97 ; 9 Bom. L. R. 1137.

(b) A prosecutes B for adultery with C, A's wife.

B denies that C is A's wife, but the Court convicts B of adultery.

Afterwards C is prosecuted for bigamy in marrying B during A's life-time. C says that she never was A's wife.

The judgment against B is irrelevant as against C.

(c) A prosecutes B for stealing a cow from him. B is convicted.

A afterwards sues C for the cow which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d) C has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant as showing motive for a crime.

(e) A is charged with theft, and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue.

(f) A is tried for the murder of B. The fact that B prosecuted A for libel, and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue.

Relevant under some other provisions of this Act. Though a judgment is not admissible under sections 40, 41 and 42, it may be relevant under sections 8, 11, 13, 35 and 54 (Explanation II).

Problem. A prosecutes B for stealing a diamond ring from him : B is convicted : A afterwards sues C, a Marwari, for the ring which B had sold to the Marwari before his conviction. A's

pleader tenders in the suit the Magistrate's judgment against B but C's Counsel objects to its relevancy. How will you decide the point? *Answer.* See illustration (c) above.

"*Res inter alios actæ* are generally irrelevant." State exceptions to the rule.

Exceptions to transactions unconnected with the facts in issue. Transactions which are not connected or linked as cause or effect but only have similarity between them are not admissible in evidence as relevant facts. But sections 40, 41, 42 and 43 are *exceptions* to the above general rule.

Under what circumstances are former judgments and decrees admissible in subsequent suits or criminal proceedings? How far, under what circumstances, and for what purposes may previous judgments, orders and decrees be deemed relevant?

Circumstances under which previous judgments and decrees are admissible in subsequent suits or criminal proceedings. Under section 40, a former judgment or decree may be admissible in a subsequent suit operating as *res judicata* under the following circumstances:

(a) if it is *inter partes*:

(b) if it is passed by a Court of competent jurisdiction:

(c) if the subject-matter in both the suits are identical.

A former judgment passed in a criminal case operates against the new trial of a person charged with an offence in a subsequent criminal proceeding with which he was charged in the former criminal case if he was acquitted under section 403, Cr. P.C. (*autre fois acquit*).

A judgment, order or decree referred to in section 41 is admissible in both civil and criminal proceedings in respect of matters declared conclusive by the judgment.

A judgment, order or decree referred to in section 42 is admissible both in civil and criminal proceedings if it relates to matters of a public

nature relevant to the enquiry. Its evidentiary value is not conclusive.

A judgment, order or decree referred to in section 43 is admissible both in civil and criminal proceedings if its existence is in issue or if it is relevant under sections 8, 11, 13 and 54 (Explanation II) etc.

Judgments inter partes and judgments not inter partes The principle, on which judgments *inter partes* are admissible in Civil and Criminal cases in order to bar the trial of a suit or criminal proceeding, is based on the *public policy* that a matter which has been decided between the parties by a Court of competent jurisdiction should not be re-agitated between them

Discuss the principles according to which judgment *inter partes* and not *inter partes* are admissible under the Evidence Act. What difference is there regarding relevancy as the judgment etc. is or is not between the same parties How far are judgments *inter partes* admissible in evidence ?

The principles on which judgments not *inter partes* are admissible are based both on *public policy* and *necessity*. As to judgments referred to in sections 41 and 42, the legal character which is declared, conferred or taken away and the right which is declared should be once for all settled in the interest of public peace, of human society, and of economic progress But the judgments referred to in section 42 are not passed with the same solemnity, citation and declaration as the judgments passed in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction. So the judgments referred to in section 42 are not conclusive as to their evidentiary value. Judgments referred to in section 43 become relevant on the principle that they are simply facts when the existence of such facts are *in issue* and also when they are relevant by some other sections of the Act.

Relevancy of judgments other than judgments in rem or inter partes. Judgments which do not operate as *res judicata* or judgments *in rem* are relevant under sections 13

State in what cases, if any, and under what provisions of the I E. Act are judgments relevant, when such judgments are neither judgments in rem nor admissible under the rule of res judicata. What is the probative value of such judgment if admissible?

(showing transaction), 35 (showing record), 42 (showing matters of public nature) and 43 (proving the existence of such judgment). But their probative value is not conclusive.

Case. Judgments, though inadmissible under sections 40 and 42, are best evidence of something that may be proved *aliundi* (if their existence is a fact in issue or relevant fact).[1]

44. Impeachment of Judgment as evidence. Any party to any suit or other proceeding may show that any judgment, order or decree, which is relevant under sections 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Problems. A, as executor of X's will instituted against B a suit to recover land belonging to X's estate. B said that A was not X's executor, the land in suit did not belong to X's estate and that there was a public path over the land in suit. A produced (a) an order appointing A as executor of X's will; (b) a judgment obtained by X brought by him against C who pleaded the existence of a public path over the land in suit. And B produced a judgment dismissing a suit brought by D against Y to recover possession of the same land. Are these judgments or any of them and the order appointing A executor of X's will relevant to the suit by A against B? If so, which of them, and why?

Answer. (a) The judgment obtained by X against C is admissible under section 13, because X asserted his right to the land in suit and it was

[1] *The Collector of Gorakhpur* v. *Palakdhari Singh*, 12 All. 1, F. B.

recognised by the Court in that suit. It is also admissible under section 13, because C, a defendant in that case, pleaded the existence of a public path over the land in suit. The judgment produced by B is not admissible under section 40 or any other section including section 13. The order appointing A executor of X's will is admissible under section 41 as it is a judgment *in rem*.

When an judgments of Courts of Justice relevant ? How can such judgments be avoided ? What is the difference between English and Indian Law on this point ?

Judgments of Courts of Justice. Sections 40-43 deal with judgments and show what judgments are relevant under what circumstances. Section 44 shows how such judgments can be avoided but it is not exhaustive. A judgment may also be avoided by means of a separate suit.

English Law. The defence that the judgment is bad for collusion and fraud can be set up only by a person who was a stranger to the suit in which such judgment was passed.

Cases It is not necessary to bring a separate suit to set aside judgments bad on any of the grounds mentioned in the section. They may be shown as bad in the very case in which they are sought to be used.[1] On the general principle of justice, an aggrieved party can set aside a judgment by a suit on the ground of fraud without resorting to this section[2]. Under English Law, a judgment cannot be set aside on the ground that it has been obtained by imposition on the Court. "A Court is not competent" means the Court acting without territorial or inherent statutory jurisdiction.[3] Collusion may be of two kinds :— (1) facts placed before

[1] *Bansi Lal* v. *Dhapo*, 24 All. 242 ; Rajib v. Lakhan, 27 Cal. 11.

[2] *Venkatappa* v. *Subba*, 29 Mad. 179.

[3] *Sardarmal* v. *Aranvayal*, 21 Bom. 205 ; *Ketlilamma* v. *Kelappan*, 12 Mad. 228.

the Court on which a judgment is founded do not exist : and (2) when they are pre-concerted to obtain the judgment. A judgment vitiated by fraud can be treated as nullity by any Court even of inferior degree[1]. A Court of inferior jurisdiction can declare a judgment of a superior Court if it is tainted by fraud, provided such inferior Court otherwise has jurisdiction to do so.[2]

State briefly the provision of the Evidence Act with reference to finger impressions. Enumerate the circumstances under which expert opinion in relevant. When the genuineness of a letter is in dispute, what are the various kinds of evidence to prove the handwriting ? (Sections 45, 47 and 73). Explain : "Expert evidence" When are the opinions of persons

Opinions of third persons when relevant.

45. Opinions of experts. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting or *finger impressions*, the opinions upon that point of person specially skilled in such foreign law, science, or art or in questions as to identity of handwriting or *finger impressions*, are relevant facts.

Such persons are called *experts*.

ILLUSTRATIONS

(a) The question is, whether the death of A was caused by poison :

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died are relevant.

(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the

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[1] *Nistarini Dassi* v. *Nundo Lal*, 26 Cal. 891.

[2] *Sarthakram* v. *Nundo Ram*, 11 C. W. N. 579.

act, or that he was doing what was either wrong or contrary to law;

are strangers to a proceeding relevant under the Evidence Act? what is the probative value of such evidence?

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A.

The opinions of experts on the question whether the two documents were written by the same person or by different persons are relevant.

Sections 45 to 51 are exceptions to the general rule that the opinions or beliefs of witnesses are not relevant.

Case. Before evidence as to comparison be taken, the writing to be compared must be proved as belonging to the person to whom it is ascribed, and the comparison should be made in an open Court.[1]

How is a fact in reference to expert opinion relevant when it is not otherwise relevant?

46. Facts bearing upon opinions of experts. Facts, not otherwise relevant, are relevant, if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

ILLUSTRATIONS

(a) The question is, whether A was poisoned by a certain poison:

[1] *Suresh Chandra* v. *Emperor*, 39 Cal. 606.

The fact, that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant.

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall :

The fact, that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant.

Case. A great care and caution should be observed in taking evidence of an expert.[1]

47. Opinions as to handwritings when relevant. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed, that it was or was not written or signed by that person, is a relevant fact.

Explanation. A person is said to be acquainted with the handwriting of another person

(*a*) when he has seen that person write, or

(*b*) when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority, and addressed to that person, or

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[1] *Panchu Mondul*, (1905) C. L. J. 385.

(*e*) when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

ILLUSTRATION

The question is, whether a given letter is in the handwriting of A, a merchant in London :

B is a merchant in Calcutta who has written letters addressed to A, and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C and D on the question whether the letter is in the handwriting of A, are relevant, though neither B, nor C, nor D ever saw A write.

How to prove handwriting. A handwriting may be proved in any of the following ways :—

When the genuineness of a letter is in dispute, what are the various kinds of evidence that may be laid before the court to prove the handwriting ?

(1) by the writer himself (s. 67):

(2) by the person who actually saw the writer write the document (s. 67) :

(3) by the evidence of the expert (sec 45), or a person acquainted with the handwriting of the writer (s. 47) :

(4) by the evidence of non-experts who have acquired a knowledge of the character of the handwriting in any one of the following ways (Explanation to s. 47) :

(a) by having seen the writer write at any time any writing :

(b) by receiving documents purporting to be written by person in answer to document written by himself or under his authority and addressed to that person :

(c) by having documents habitually submitted to him which purported, to be written by that person :

(5) by comparing the handwriting in question with the handwriting proved, to the satisfaction of the Court, to be of the person who is alleged to have written the writing in question (s. 73).

Cases. An expert witness may be cross-examined by the Court or with its permission by the opposing advocate at any stage of the proceeding in order to get adequate materials as to the proof of the handwriting.[1] It is for the Judge to say whether the combination of designs constituting the trade mark was such as to deceive the purchaser.[2] A conviction should not be based on the evidence of a handwriting expert alone.[3]

48. Opinion as to existence of right or custom when relevant: When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Explanation. The expression, "general custom or right," includes customs or rights common to any considerable class of persons.

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[1] *Shankar* v. *Ramji*, 5 Bom. L. R. 663 ;

[2] *Nemchand* v. *Wallace*, 34 Cal. 495.

[3] *Kali Chandra Mukerjee* v. *King Emperor*, 6 All. L. J. 184 ; *Lalta Prasad*, 13 O C.

ILLUSTRATION

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

What facts are relevant when any right or custom is in question?

What facts are relevant when any right or custom is in question? Facts referred to in sections 13, 32 clause (4), 32 clause (7), 48 and 51 are relevant when the question as to the existence of any right or custom is in issue or relevant.

Sections 13, 32 and 48 compared. Section 13 refers to *all rights and customs* whether public, general or private and their specific instances. Section 32, clause (4), refers to statements as to public right or custom or matter of public or general intrest which existed before the matter in controversy arose and when such matter is to be proved by a person who is dead or can not be produced before the Court. Section 32 clause (7) refers to statements of matters as are mentioned in section 13 clause (a) and contained in documents. Section 48 refers to evidence of persons who are produced before the Court.

Cases. Opinions of a person as to the existence of a custom or right who writes documents for the people of the locality is admissible under this section.[1] A custom must be proved by specific instances and not by a mere opinion evidence.[2] A custom must be definite.[3] The opinion must be independent though it may be based on hearsay statements.[4] Opinions of leading members of a

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[1] *Sariatullah* v. *Pran Nath*, 26 Cal. 184.
Rahimalbai v. *Hirbai*, 3 Bom. 34.
Lachman Rai v. *Akbar Khan*, 1 All. 440.
Garurudhwaja Pershad, 5 C. W. N. 33.

community influenced by judicial and professional prepossessions are not relevant.[1] Section 48 refers to the opinion of a living writness examined before the Court.[2]

49. Opinions as to usages, tenets etc, when relevant. When the Court has to form an opinion as to—

(a) the *usages* and *tenets* of any body of *men* or *family*,

(b) the *constitution* and *government* of any religious or charitable foundation, or

(c) the *meaning of words* or terms used in particular *districts* or particular classes of *people*,

the opinions of persons having special means of knowledge thereon, are relevant facts.

Cases. The witness giving his opinion must have special knowledge although such knowledge is derived from the deceased member of the family.[3] Such opinion must be expressed by conduct and not from general reputation.[4]

What qualification must a witness speaking as to relationship possess ?

50. Opinion as to relationship when relevant. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family

[1] *Adv. General* v. *Jimvabai*, 41 Bom. 181.

[2] *Jagmohandas* v. *Mangaldas*, 10 Bom. 542.

[3] *Saratjit Pratab Bahadur*, 2 A. L. J. 720.

[4] *Haji Saboo Sidick*, 27 Bom. 455.

or otherwise, has special means of knowledge on the subject, is a relevant fact.

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under sections 494, 495, 497, or 498 of the Indian Penal Code.

ILLUSTRATIONS

(a) The question is, whether A and B were married :

The fact, that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is, whether A was the legitimate son of B :

The fact, that A was always treated as such by members of the family, is relevant.

State how opinion of experts may be ascertained.

51. Grounds of opinion when relevant. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

ILLUSTRATION

An expert may give an account of experiments performed by him for the purpose of forming his

What is the reason for excluding "opinion evidence."

Reasons for excluding "Opinion Evidence." The general rule is that a witness is to state facts and not to give his opinion. It is the function of a Judge to form opinion on facts placed before him.

But very often the subject-matter of the inquiry is such that inexperienced persons are unlikely to

form a correct judgment without the assistance of the opinions of persons possessing special skill and competent knowledge on the subject-matter. So their opinions are made admissible.

Opinions of witnesess when relevant. (ss. 45-51). These sections are *exceptions* to the general rule that the *opinions or beliefs of witnesses are not admissible.*

State upon which subjects the opinions of witnesses are admissible in evidence. Are opinions of people facts as defined in the Evidence Act, and are they in any case relevant? When are the opinions of persons who are strangers to a proceeding relevant under the Evidence Act? What is the probative value of such evidence? State the exceptions to the rule excluding "opinion evidence."

(1) The opinions of experts on foreign law (which are facts) or science, art or on identity of handwriting or finger impressions are relevant (s. 45).

(2) Facts supporting or inconsistent with such opinions are also relevant (s. 46).

(3) Opinions of non-expert witnesses as to handwriting who are acquainted with such handwriting are relevant (s. 47).

(4) Opinions of non-expert witnesses as to existence of any right or custom are relevant when such persons are likely to know it (s. 48).

(5) Opinions of persons having special means of knowledge as to usages and tenets, or constitution of any religious or charitable foundation, or meaning of words or terms used in particular district or by particular class of people are relevant (s. 49).

(6) Opinions of any person having special means of knowledge on the subject of relationship when such opinion is expressed by conduct is relevant (s. 50).

(7) Whenever the opinion of any *living* person is relevant, the grounds on which such opinion is based are also relevant (s. 51).

The *probative value* of such opinions depends on the reasonableness and soundness of the grounds on which such opinions are based. If the Court is not satisfied with the validity of the grounds to

warrant the inference or opinion of a witness founded thereon, its probative force is nothing. *Except* in the cases where the question of marriage is a fact in issue, such opinions, based on sound grounds, may have sufficient probative value to justify a judicial finding.

Character when relevant.

When is evidence of character of a party to a civil proceeding relevant? (Ss. 52-55) How far is character relevant and admissible in evidence in civil suits? (Ss. 52 and 55)

52. In civil cases character to prove conduct imputed irrelevant. In civil cases, the fact that the *character* of any person concerned is such as to render probable or improbable any conduct imputed to him, is *irrelevavt, except* in so far as such character appears from facts otherwise relevant.

53. In criminal cases, previous good character relevant. In criminal proceedings, the fact that the person accused is of a good character is relevant.

How far is "character" relevant and admissible in criminal cases?

54. Previous bad character not relevant except in reply. In criminal proceedings, the fact that the accused person has a bad character is irrelevant unless evidence has been given that he has a good character, in which case it becomes relevant.

Explanation 1. This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2. A previous conviction is relevant as evidence of bad character.

Cases. Evidence of character cannot alter facts proved but may explain conduct. So, evidence of

"In criminal proceedings, character of an accused is irrelevant." Comment.

bad character is not generally relevant.[1] Evidence of good character is of no value if the case against the accused is clear.[2] Evidence of repute is different from evidence of rumour.[3]

Evidence of bad character whether elicited by the prosecution or by the defence is irrelevant.[4] Such evidence only prejudices and does not prove guilt.[5] A previous conviction is admissible either to enhance punishment under section 75 of the Penal Code or to prove in reply to the evidence of good character.[6] A previous conviction may also be relevant under sections 8 and 14.[7]

55. Character as affecting damages. In civil cases, the fact, that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

How is "character" defined in I. E. Act?

Explanation. In sections 52, 53, 54 and 55, the word 'character' includes both reputation and disposition; but, except *as provided in section 54*, evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

Character of parties in civil and character of accused in criminal proceedings. In *civil* cases, no evidence of character of parties

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[1] *Byki Nuth*, 10 W. R. 17.

[2] *Queen Empress* v. *Nur Mahomed*, 8 Bom. 227.

[3] *Rai Isri Prasad*, 24 Cal. 621.

[4] *Emperor* v. *Gangaram*, 22 Bom. L. R. 1274.

[5] *Amrita Lall* v. *Emperor*, 42 Cal. 957.

[6] *Emperor* v. *Duming*, 5 Bom. L. R. 1034.

[7] *Emperor* v. *Allemiya*, 5 Bom. L. R. 805.

to render probable any conduct imputed to him is admissible. But, if his character is a fact in issue or otherwise relevant, evidence of character of a party is admissible in evidence. Again, if the evidence of character is necessary to ascertain the amount of damages to which the plaintiff in a civil case is entitled, the evidence of his character is admissible.

"Evidence of character of parties is not admissible except where the nature of the proceedings is to put the character in issue or where the proceedings are criminal." Explain and illustrate.

In *criminal* proceedings, evidence of good character of the accused is admissible to show whether the offence imputed to him was really committed by him. No evidence as to his bad character is admissible to be proved by the prosecution but it can do so in rebuttal when evidence is adduced by the accused in proof of his good character.

When is bad character of an accused relevant in a criminal case?

ILLUSTRATIONS

A sues B for damages on the allegation that B imputed unchastity to A. Here, A may show that she is of chaste character and B may show that she is unchaste.

A is accused of bad livelihood. The prosecution may adduce evidence to show that A has no means of livelihood and that he is a bad character or that he was previously convicted of theft.

Reputation Evidence. The evidence of reputation shall be of general reputation and must be confined to the nature of a particular case with which a person is charged. Reputation is constituted by public opinion and a witness must not depose only to his own opinion to prove one's character.

In whht circumstances and in regard to what matters is reputation evidence admissible? State briefly the reasons for the admission of such evidence in cases in which it is admissible and its

Under clause (4), section 32, reputation regarding public rights is admissible on the principle of necessity and on the ground of public interest.

A general reputation that a man and a woman are husband and wife may be received in evidence

rejection in others.

in proof of marriage. Unchastity of a woman may be proved when she prosecutes a man for rape.

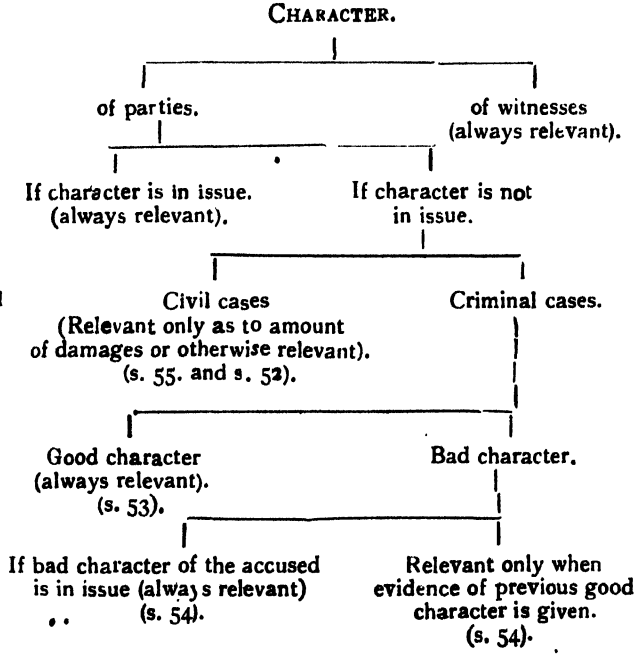
Does the meaning of the term "character" in the I E. Act differ from that given in English Law?

Meaning of the term "Character"—English and Indian Law distinguished. In English Law, "*character*" simply means reputation only and does not include disposition as in Indian Law.

"Reputation" means what is thought of a person by the public. "Disposition" means the whole frame of the mind. It comprehends motives of action. It is permanent and settled.

Evidence as to Character.

When does the evidence of character of parties become relevant in judicial proceedings? When is evidence as to character of parties and witnesses relevant in civil and criminal cases?



PART II.—ON PROOF.

CHAPTER III.—Facts which need not be proved (ss. 56-58).

56. Fact judicially noticeable need not be proved. No fact of which the Court will take judicial notice need be proved.

What is judicial notice and of what facts is such notice taken? Classify the facts of which judicial notice is taken without the necessity of formal proof.

57. Facts of which Court must take judicial notice. The Court shall take *judicial notice* of the following facts :—

(1) all laws or rules having the force of law, now or heretofore in force, or hereafter to be in force, in any part of British India ;

(2) all public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed ;

(3) Articles of War for Her Majesty's Army or Navy ;

(4) the course of proceeding of Parliament, and of the Councils for the purpose of making Laws and Regulations established under the Indian Councils Act or any other law for the time being relating thereto.

Explanation—The word "Parliament" in clauses (2) and (4) includes :—

(a) the Parliament of the United Kingdom of Great Britain and Ireland :

(b) the Parliament of Great Britain :

(c) the Parliament of England :

(d) the Parliament of Scotland : and

(e) the Parliament of Ireland.

(5) the accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland;

(6) all seals of which English Courts take judicial notice; the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any Local Government in Council; the seals of Courts of Admiralty and Maritime Jurisdiction, and of Notaries Public; and all seals which any person is authorised to use by any Act of Parliament or other Act or Regulation having the force of law in British India;

(7) the accession to office, names, titles, functions and signatures of the persons filling, for the time being, any public office in any part of British India, if the fact of their appointment to such office is notified in the Gazette of India, or in the official Gazette of any Local Government;

(8) the existence, title, and national flag of every State or Sovereign recognised by the British Crown;

(9) the divisions of time, the geographical divisions of the world, and public festi-

vals, fasts, and holidays notified in the official Gazette ;

(10) the territories under the dominion of the British Crown ;

(11) the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons ;

(12) the names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorised by law to appear or act before it ;

(13) the *rule of the Road* "on land or at sea".

In all these cases, and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

Cases. Although a Court may take judicial notice of the facts mentioned in this section, a party is not absolved from proving such facts.[1]

[1] "*The Englishman*" *Ltd., v. Lajpat Rai*, (1910) 37 Cal. 760.

The British Crown recognises all Native States.[1] A registered power of attorney is admissible in evidence without proof.[2]

What is Judicial Notice?

Judicial notice means notice of facts which a Judge shall take without any evidence. Such facts are illustrated in section 57 but they are not exhaustive therein.

What is meant by the rule of the road?

The Rule of the Road means any of the rules which have been enacted for the purpose of avoiding collision either on land or at sea e. g. carriages are always to keep to the left side.

58. Facts admitted need not be proved. No fact need be proved in any proceeding

(a) which the parties thereto or their agents agree to admit at the *hearing*, or

(b) which, *before* the hearing, they agree to admit by any *writing* under their hands, or

(c) which, by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings :

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Cases. Admission of facts operates as an estoppel and excludes evidence.[3] A document,

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[1] *The Maharaja of Kashmir* v. *Mohan Lal*, P. R. No. 51. of 1886.

[2] *Krishna Nath*, 24 Cal. 176.

[3] *Burjorji Cursetji Panthaki* v. *Muncherji Kuverji*, 5 Bom 143, 152.

not duly stamped, may not be admissible ; but a claim founded thereon may be decreed on admission of the party.[1] A suit may be decreed on the admission of signature by the adult defendant on a basis-bond against him only.[2] An admission of a fact by implication in a pleading is confined to the particular issue only.[3] The court will require proof if the admission appears to have been obtained by fraud or unfair means.[4]

Sections 17-31 refer to admissions which are proved in the course of taking evidence. But section 58 refers to admission which are made either before or at the trial and not in the course of taking evidence. Under section 58, the court can exclude admissions only when it is tainted by fraud but it can not ignore it altogether or receive any evidence contradictory to such admissions.

CHAPTER IV.

OF ORAL EVIDENCE (SS. 59-60).

59. Proof of facts by oral evidence.

All facts, *except the contents of documents*, may be proved by oral evidence.

Oral evidence means evidence given by word of mouth in open Court or in such other ways (signs by a mute) as the Court may direct to be intelligent enough for judicial purpose. It is wider than a verbal evidence which is confined to voice.

[1] *Rahimatolla* v. *Murray*, 11 I. C. 810.

[2] *Lakhichand* v. *Lalchand*, 42 Bom. 352.

[3] *Amritalal Bose*, 23 W. R. 214.

[4] *Oriental Government Security* v. *Narasimha Chari*, 25 Mad. 183, 205.

Cases. A written document shall be produced to prove its contents because it is the best evidence.[1] Where oral testimony is conflicting, a written document is essentially necessary.[2]

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Comment.

Explain and discuss the rule: "Oral evidence in all cases whatever must be direct." What exceptions to this rule are permissible? Give reasons and illustrations in support of your answer.

60. Oral evidence must be direct. *Oral evidence must, in all cases whatever, be direct*; that is to say,—

(1) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

(2) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

(3) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense, or in that manner;

(4) if it refers to an opinion, or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

What is the basis and what are the limitations of the exception that hearsay is evidence in matters

(a) *Provided* that the opinion of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held, may be proved by the production of such treatise, if the author is dead, or can not be found, or has become

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[1] *Dinomoyi Debi* v. *Roy Luchmiput*, 7 I. A. 8.

[2] *Mussumat Imam Bandi* v. *Hurgovind Ghose*, 4 M. I. A. 403.

incapable of giving evidence, or can not be called as a witness without an amount of delay or expense which the court regards as unreasonable :

of public or general interest?

(b) *Provided* also that, if oral evidence refers to the existence of condition of any material thing other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.

Read notes under section 32 in this connection.

Reasons for excluding hearsay evidence. Hearsay evidence is, as a rule, excluded

What is Hearsay Evidence? State briefly the grounds for the exclusion of hearsay evidence.

(i) because the person whose statement a witness deposes to was not on oath when he made the statement :

(2) because such person's statement was not tested by cross-examination :

(3) because it would tend to protract the trial :

(4) because it is in itself a weak evidence :

(5) because the person who proves the hearsay statement might himself be deceived :

(6) because it is not convincing :

(7) because the law requires that the best available evidence should be produced : and

(8) because truth loses its value in the process of repetition.

When a witness in a civil suit be allowed to testify to what he heard another person say. A witness can testify in *civil* cases by oral evidence (on oath before a court) what he heard another person say under sections 17-23 and 32-38.

Under what circumstances will a witness in a *civil* suit be allowed to testify to

what he heard another person say? Illustrate your answer by examples.

The question is, whether a horse sold by A to B is sound. A says to B "go and ask C: C knows all about it." C's statement is an admission.

In order to compromise a *civil* suit, A and B made admissions before C: the statement of C on oath may or may not be admissible to prove those admissions under section 23.

Direct. This word means here "as opposed to hearsay, second-hand or derived evidence."

Case. Section 60 does not exclude circumstantial evidence of things which can be seen, heard or felt. A person is a competent witness to prove that the executant of the sale-deed admitted its execution in the presence of a witness.[1]

CHAPTER V.

OF DOCUMENTARY EVIDENCE (ss. 61-90).

How may the contents of a document be proved

61. Proof of contents of document. The contents of documents may be proved either by primary or by secondary evidence.

Case. Section 61 says that the contents of a document must be proved either by the document itself or by secondary evidence when the latter is admissible and by no other method of proving the contents of document.[2]

62. Primary Evidence. Primary evidence means the document itself fort he inspection of the Court.

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[1] *Nilkant*, Ben. L. R. 18.

[2] *Ram Prasad* v. *Raghu Nandan Prasad*, 7 All. 738, 743.

Explanation 1. Where a document is executed in several parts, each part is primary evidence of the document.

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What is primary evidence? Distinguish between primary and secondary evidence.

Where a document is executed in counterparts, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2. Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

ILLUSTRATION

A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Primary evidence is that which from its own production shows to admit of no higher or superior source of evidence.

What is "primary evidence"?

If a party admit the contents of a document, his admission is primary evidence against him. If he delivers a copy of a document to the opposite party, it becomes primary evidence against him.

Direct evidence is the testimony of a witness as to the existence or non-existence of the fact or facts in issue. Circumstantial evidence means the

What is "direct evidence"?

testimony of a witness to other relevant facts from which the facts in issue may be inferred. In Jurisprudence and in the I. E. Act, direct evidence is limited to cases where the principal fact is attested directly by witnesses, things or documents.

Comment on Para 2, Explanation 1 of Section 62, I. E Act.

Para 2, Explanation 1. If A grants a lease (pattah) to B and B executes its counterpart (kabuliyat) in favour of A and they are delivered to A and B in whose favour they were respectively executed, both of them are original documents. But the lease granted by A is a primary evidence against A and the document executed by B is a secondary evidence against A. The document executed by B is a primary evidence against B and the document executed by A is a secondary evidence against B.

* * * *

Define secondary evidence. Give two examples.

* **63. Secondary evidence.** Secondary evidence means and includes :—

(1) certified copies given under the provisions hereinafter contained ;

(2) copies made from the original by *mechanical* processes, which, in themselves insure the accuracy of the copy, and copies compared with such copies ;

(3) copies made from, or compared with, the original ;

(4) counterparts of documents as against the parties who did not execute them ;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

ILLUSTRATION.

(a) A photograph of an *original* is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

When is a copy of a copy secondary evidence? See clause (2) and illustrations (b) and (c) of Section 63.

(b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter if it is shown that the copy made by the copying machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence, but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original nor an oral account of a photograph or machine-copy of the original, is secondary evidence of the original.

Cases. A copy of a certified copy which has not been compared with the original is not admissible.[1] A written statement of the contents of a copy of a document is not admissible if the writer had not seen the original.[2] A copy of the newspaper publishing a libellous letter is not admissible as secondary evidence when the original letter is not forthcoming and when there is no evidence to prove that it was written by the accused.[3] If a person who has seen a document but is unable to read it, his evidence is not admissible as secondary evidence.[4]

[1] Ibid.

[2] *Kanayalal* v. *Pyarabai*, 7 Bom. 139.

[3] *Ramlal Balaram*, 8 A. L. J. 302.

[4] *Ghure*, 12 A. L. J. 339.

Oral evidence is not admissible to prove the terms of an unregistered document of which registration is compulsory.[1]

64. Proof of documents by primary evidence. *Documents must be proved by primary evidence* except in the cases hereinafter mentioned.

"As a general rule, documents are proveable by the production of the originals alone." Explain and illustrate the principle which underlies this rule.

The principle of proving documents by their originals alone. In order to prevent fraud and to enable the Court to inspect the documents, the law requires that the best evidence should be given. Such best evidence is the document itself. So, section 64 has provided that the primary evidence or original document itself should be produced except in the cases mentioned in section 65 which admits secondary evidence.

Give example of the principle that no evidence shall be received which shows on its face that it only derives its force from some other evidence which is withheld

The object of a document is to perpetuate the memory of what is written down and to furnish correct proof of the fact written. In the case of a written contract, the writing shall be treated as final as to the terms of the contract and no oral evidence is admissible to vary it. It is not safe to rely on the recollection of a witness, however honest he may be, as to the contents of a written instrument.

A sues B on a bond. A, instead of producing the bond, produces a witness to the bond to prove its contents and no satisfactory account is given for the non-production of the bond. The oral evidence is not admissible.

Case. Where a written instrument is not the fact in issue, proof of a fact independent of such instrument is admissible.[2]

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[1] *Fesing* v. *Bachrad*, 1876, Bom; P. L. 242.

[2] *Balbhadar Prasad* v. *The Maharaja of Betia*, 9 All. 351, 356.

65. Cases in which secondary evidence relating to documents may be given. Secondary evidence may be given of the existence, condition, or contents of a document in the following cases :—

(a) when the original is shown or appears to be in the possession or power —

(i) of the person against whom the document is sought to be proved, or

(ii) of any person out of reach of, or not subject to, the process of the Court, or

(iii) of any person legally bound to produce it,

and when, after the notice mentioned in section 66, such person does not produce it ;

(b) when the existence, condition, or contents of the original have been proved to be admitted in writing by the person against whom it is proved, or by his representative in interest ;

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents can not, for any other reason not arising from his own default or neglect, produce it in reasonable time ;

(d) when the original is of such a nature as not to be easily moveable ;

(e) when the original is a public document within the meaning of section 74 ;

(f) when the original is a document of which a certified copy is permitted by this

When and under what circumstances may secondary evidence be given ? How can a plaintiff prove the contents of a letter which he wrote and posted to the defendant ? If he can do so in more ways than one, state all such ways When is secondary evidence of a document admissible ? What are the cases in which secondary evidence may be given of the existence, condition or or the contents of a document ?

When is the secondary evidence of the contents of a document in the possession of the adversary for the production of which no notice has been given admissible? When is a party entitled to give secondary evidence of a document without calling on the party in possession of the same to produce it?

Act, or by any other law in force in British India, to be given in evidence;

(g) when the original consists of numerous accounts or other documents which can not conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c), (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

A plaintiff can prove the contents of a letter by adducing secondary evidence. He can show (a) that the letter is in possession of the defendant or of any person who can not be produced before the court, or (b) that the defendant admitted its existence, condition or contents in writing, or (c) that the original has been destroyed or lost or can not be produced for any reason not arising from the plaintiff's neglect. In cases (a) and (c), any secondary evidence is admissible. In case (b), only the written admission is admissible.

Is there any degree in the

There is no degree of secondary evidence. There is no degree in the evidentiary value of secon-

dary evidence. A person who is to adduce secondary evidence shall have to adduce such secondary evidence as section 65 permits him to do (see section 65).

evidentiary value of secondary evidence ? State the rule as to what kind of secondary evidence is admissible in what cases.

Registered sale-deed in possession of adverse party. According to section 65, any secondary evidence of the contents of a document is admissible. Under section 63, clause (3), a certified copy of such document taken from the Registration Office, or under clause (5), section 63, oral accounts of the deed may be admissible. According to section 89, the court may presume that the deed was duly stamped and executed as required by law. As the document is in the possession of the adverse party, no notice under section 66 is necessary to make out a case for offering secondary evidence.

What kind of secondary evidence is admissible in respect of a registered sale-deed in the possession of the adverse party ?

An unregistered simple bond in possession of a third party. By reading sections 63 and 65 together, the unregistered document may be proved by oral account of its contents. If its copy is available and if it had been compared with its original, such copy may also be the secondary evidence used in this case.

What kind of secondary evidence is admissible in respect of an unregistered simple bond in the possession of a third party ?

Cases. Secondary evidence is not admissible without accounting for the non-production of the original.[1] The question of admissibility is ordinarily for the court of first instance to decide.[2] Questions as to the admissibility should be decided as they arise.[3] Although, according to this section, secondary evidence is not admissible to prove the contents of a document not produced by a person who is not legally bound to produce it, secondary evidence is, as a matter of fact, admitted following the principles

[1] *Krishna Kishore* v. *Kishori Lal*, 14 Cal. 486.

[2] *Abdul Razack* v. *Mau*, 2 U. B. R. 382.

[3] Ibid.

of English practice.[1] Secondary evidence of a document inadmissible for want of registration or of stamps can not be admitted.[2] If a registered sale-deed is lost, a certified copy is admissible as secondary evidence.[3] Any secondary evidence of a public document other than a certified copy is admissible when proof of the loss of the original is established, or when its certified copy is not available.[4] A secondary evidence of a document of more than thirty years old is admissible under this section or section 90 when the proper custody of the original and its loss are proved.[5]

Secondary evidence is not admissible without proof of the loss of its original on which the claim is based.[6] When the public document is in existence, its certified copy is the only secondary evidence admissible.[7] Where a case falls under clause (a) or (c) or (f) of section 65, any secondary evidence is admissible[8]. The general result of the examination of public documents by a person is admissible.[9] If a document is admitted in evidence without objection, its admissibility can not be questioned

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[1] Field, P. 228.

[2] *Varada* v. *Krishnasami*, 6 Mad. 117 ; *Damodar Jagannath* v. *Atmaram Baboji*, 12 Bom. 443.

[3] *Enlisham Ali* v. *Jamna Prasad*, 24 Bom. L. R. 575.

[4] *Syad Pir Shah* v. *Gulab Shah*, P. R. No. 63 of 1878.

[5] *Khetter Chunder* v. *Khetter Paul*, 5 Cal. 886.

[6] *Womesh Chunder* v. *Shama Sundari*, 7 Cal. 98.

[7] *Kalandan* v. *Kunhunni*, 6 Mad. 80, 81.

[8] *In the matter of a collision between the "Ava" and the "Brenhilda"*, 5 Cal. 568, 573.

[9] *Sundar Kuar* v. *Chandrashwar Prasad*, 34 Cal. 293.

in the Appellate Court.[1] The Appellate Court was wrong in admitting a secondary evidence when it was rejected in the Court of the first instance because the plaintiff having had the possession of the original did not produce it.[2] Oral evidence of the contents of a document (letter) was rejected because the letter was neither produced nor called for.[3]

66. Rules as to notice to produce. Secondary evidence of the contents of the documents referred to in section 65, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, "or to his attorney or pleader", such notice to produce it as is prescribed by law ; and, if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case :

State the cases in which notice to produce need not be given to render secondary evidence of the contents of a document admissible.

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it ;

(1) When the document to be proved is itself a notice ;

(2) When, from the nature of the case,

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[1] *Kishori Lal* v. *Rakhal Das*, 31 Cal. 155 ; *Chimnaji* v. *Dinkar*, 11 Bom. 320.

[2] *Kishori Lal* v. *Rakhal Das*, 31 Cal, 155.

[3] *Kameshwar Pershad* v. *Amanutulla*, 26 Cal. 53.

the adverse party must know that he will be required to produce it;

(3) When it appears or is proved that the adverse party has obtained possession of of the original by fraud or force;

(4) When the adverse party or his agent has the original in Court;

(5) When the adverse party or his agent has admitted the loss of the document;

(6) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

67. Proof of signature and handwriting. If a document is alleged to be signed or to have been written, wholly or in part, by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Cases. *Execution* means signing, sealing and delivery of a document. It is the last act or series of acts which completes it [1]

The executant denied the Kabala. All witnesses to it were dead. A person who knew the handwriting of one of the attesting witnesses swore that the signature of that witness to the attestation clause of the deed was genuine. It was held that the execution was sufficiently proved.[2]

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[1] *Bhawanji Harbhum* v. *Devji Punja*, 19 Bom. 635

[2] *Abdulla Paru* v. *Gannbai*, 11 Bom. 690.

68. Proof of execution of document required by law to be attested. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution if there be an attesting witness alive and subject to the process of the Court, and capable of giving evidence.

State the provisions of the I. E. Act governing proof of execution of documents that are required by law to be attested. (ss. 68-71). How will you use in evidence a document required by law to be attested ? (See sections 68-71).

What is meant by an attesting witness ? How is a document required by law to be attested proved ? How is the same document to be proved if the attesting witness is

Cases. Evidence of an attesting witness to prove a document requiring attestation is necessary if such witness is available.[1] That an attesting witness will prove hostile is no ground not to examine him.[2] A personal covenant to pay mortgage-money separable from the security can not be proved without the evidence of an attesting witness.[3] But, according to the Calcutta High Court, such personal covenant can be proved without the evidence of an attesting witness.

'Attestation' means that the witness shall be present at the execution and shall also testify that the document has been executed by proper person. To attest, therefore, is to bear witness to a fact.[4] According to the Allahabad and Patna High Courts, the scribe of a mortgage-deed can not be regarded as an attesting witness simply because he has signed the deed even though the deed may have been executed in his presence.[5] But the

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[1] *Veerappa Kavundan* v *Ramasami*, 30 Mad. 251 ; *Ram Gopal* v. *Aipna Kunwar*, 44 All. 495.

[2] *Tula Singh* v. *Gopal Singh*, 1 P. L. J. 369.

[3] *Veerappa Kavundan* v. *Ramasami*, 30 Mad. 251.

[4] *Sasi Bhusan Pal* v. *Chandra Peshkar*, 33 Cal. 861, 864.

[5] *Badri Prasad* v. *Abdul Karim*, 35 All. 254 ; *Ram Bahadur* v. *Ajodhya*, 20 C. W. N. 699 (Patna)

dead or denies attestation

Madras and the Calcutta High Courts have held a contrary view.[1] An attesting witness in this section means an attesting witness in section 59 of the Transfer of Property Act.[2] An admission of a deed of mortgage by one of the executants does not excuse the attestation of the document as evidence against other executants.[3] The evidence of one of the two attesting witnesses was sufficient to prove a mortgage-deed without proof that another witness also witnessed the attestation.[4]

69. Proof where no attesting witness found. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwritting, and that the signature of the person executing the document is in the handwriting of that person.

Cases. The proof of the handwriting of the scribe in the names of two of the four attesting witnesses and in his own name was considered sufficient in a case where all the witnesses and the scribe were *dead*.[5] The proof of handwritings of the mortgagor in his name and also of the two

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[1] *Paramasiva Udayan* v. *Krishna*, 41 Mad. 535; *Raj Narain Ghose* v. *Abdur Rahim*, 5 C. W. N. 454, *Jagannath* v. *Bajrang*, 48 Cal. 61.

[2] *Moti Chand* v. *Lalla Prasad*, 40 All. 256.

[3] *Satish Chandra* v. *Jogendranath*, 44 Cal. 345.

[4] *Ram Dei* v. *Munna Lal*, 13 All. 109; *Shib Dayal* v. *Sheo Ghulam*, 39 All. 941.

[5] *Krishna Jiva* v. *Bishnath*, 34 All. 615.

marginal witnesses was sufficient to prove a mortgage deed where all those persons were dead.[1]

70. Admission of execution by party to attested document. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Cases. The admission of the executant is a sufficient proof of the execution of an attested document.[2] But, if the mortgagee produces evidence which shows that the document was not properly attested, the admission by the executant was held to be insufficient.[3] The Calcutta and the Allahabad High Courts have held that the word *'admission'* means the admission in the course of a trial and not the admission to the attesting witness.[4] According to the Patna High Court, such admission may mean admissoin made before the institution of the suit.[5]

71. Proof when attesting witness denies the execution. If the attesting witness *denies* or *does not recollect* the execution of the document, its execution may be proved by other evidence.

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[1] *Uttam Singh* v. *Hukam Singh*, 39 All. 112.

[2] *Jagannath* v. *Ravji*, 24 Bom. L. R. 1296.

[3] *Musammat Hira Bibi* v. *Ramdhan Lal*, 6 P. L. J. 465.

[4] *Abdul Karim* v. *Salimun*, 27 Cal. 190, *Raj Mangal* v. *Mathura Dubain*, 38 All. 1 (c. f 44 All. 127).

[5] *Nageshwar Prasad* v. *Bachu*, 4 P. L. J. 511.

Cases. The word '*execution*' in this section includes attestation.[1] An "attesting witness" is one who sees the execution of the document and signs it as a witness (*Mt. HiraBibi* v. *Ramdhan Lal*, 6 P. L. J. 465).

72. Proof of document not required by law to be attested. An attested document not required by law to be attested may be proved as if it was unattested.

73. Comparison of signature, writing, or seal, with others admitted or proved. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

This section applies also, with any necessary modifications, to finger impressions.

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[1] *Laksman Sahu* v. *Gokhul Mahara*, (1921) Pat. 154.

Cases According to the Calcutta High Court, the words *"by whom it purports to have been written or made"* mean that the writing itself must state or indicate that it was written by that person.[1] But, according to the Bombay High Court, the expression means "by whom it is alleged to have been written or made."[2]

Public Documents.

✳ **74. Public documents.** The following documents are public documents:

What documents are public and how may they be proved?

1. Documents following the Acts, or records of the Acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial, and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country.

2. Public records kept in British India of private documents.

Cases. Reports made by a police officer under sections 157 and 168 of the Criminal Procedure Code are not public documents.[3] Information relating to the commission of a cognisable offence recorded under section 154, Criminal Procedure

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[1] *Barindra Kumar Ghose* v. *Emperor*, 37 Cal. 467, 502. (Cf. *Sarojini Dasi* v. *Hari Das Ghose*, 49 Cal. 235).

[2] *Emperor* v. *Ganpat Balkishna*, 14 Bom. L. R. 310.

[3] *Queen Empress* v. *Arumugam*, 20 Mad. 189, 197 (F. B.)

Code, is a public document[1] A report of an executive official is not a public document.[2] Income tax return is not a public document.[3] Census Registers are not public documents.[4] A petition of compromise and the order of the court thereon are public documents.[5] A register of deaths kept by a police officer is a public document.[6]

Clause (e) of section 65 provides that a public document may be proved by its certified copy.

Problem. The defence to a suit is that the trial of certain issues raised in it is barred by a previous judgment. How may the contents of the judgment be proved ?

Answer. The judgment is a public document. Section 65, clause(e), permits such document to be proved by its certified copy which shall be obtained as provided by section 76.

75. Private documents. All other documents are private.

76. Certified copies of public documents. Every public officer having the custody of a public document which any person has a right to inspect shall give that person, on demand, a copy of it, on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or

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[1] *Abdul Rahman* v. *Queen Empress*, 1 U. B. R. 24.

[2] *Fazl Ahmad* v. *The Crown*, (1913) P. R. No I of 1914, Cr.

[3] *Ali Khan*, 23 Cal 950.

[4] *Bhavanrao*, 6 Bom. L. R. 535.

[5] 1 A. L. J. 364.

[6] *Tamijudin* v. *Tazu*, 46 Cal. 152.

part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorised by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation. Any officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Case. The Loan Register of the Public Debt Office in the Bank of Bengal is a public document.[1]

77. Proof of documents by production of certified copies. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

78. Proof of other official documents. The following public documents may be proved as follows :—

(1) Acts, orders, or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,—

(a) by the records of the departments,

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[1] *Chandi Charan* v. *Boistab Charan*, 31 Cal. 284.

certified by the heads of those departments respectively, or

(b) by any document purporting to be printed by order of any such Government :

(2) The proceedings of the Legislatures,—

(a) by the journals of those bodies respectively,

(b) by published Acts or abstracts, or

(c) by copies purporting to be printed by order of Government :

(3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer :

(4) The Acts of the Executive or the proceedings of the Legislature of a foreign country,—

(a) by journals published by their authority, or commonly received in that country, as such, or

(b) by a copy certified under the seal of the country or sovereign, or

(c) by a recognition thereof in some public Act of the Governor-General of India in Council :

(5) The proceedings of a Municipal body in British India,—

(a) by a copy of such proceedings, certified by the legal keeper thereof, or

(b) by a printed book purporting to be published by the authority of such body :

(6) Public documents of any other class in a foreign country,—

(a) by the original, or

(b) by a copy certified by the legal keeper thereof, with a certificate under the seal of a Notary Public, or of a British Consul or Diplomatic Agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

Judgment of a foreign Court. A Judgment is a public document under clause (6) of section 78. A copy of such judgment, certified by the legal keeper thereof with a certificate with the seal of a Notary Public or of a British Consul or of a Diplomatic Agent, that the copy is duly certified by the officer having the legal custody of the original and upon proof of the character of the document according to the law of the foreign country, is secondary evidence.

What kind of secondary evidence is admissible in respect of the judgment of a foreign Court ?

Case. Under this section a Court may refer to appropriate books or documents of reference on matters of public history[1].

[1] *The 'Englishman' Ltd.* v. *Lajpat Rai*, 37 Cal. 760.

Presumptions as to Documents.

Give a brief ist of the documents which the Court is bound to presume to be genuine or accurate.

Sections 79-90 deal with presumptions as to documents. Sections 79-85 and 89 provide that a Court *shall* presume the genuineness of a document produced before it unless it is disproved. Sections 86-88 and 90 provide that a Court *may* presume a document to be genuine but it is not bound to do so and may call for further evidence to prove its genuineness.

79. Presumption as to genuineness of certified copies. (1) The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified by any officer in British India, or by any officer in any Native State in alliance with her Majesty, who is duly authorised thereto by the Governor-General in Council, to be genuine :

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

(2) The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

Case. The identity of a person can not be presumed[1].

[1] *Durga*, 11 Cal. 580 ; *Emperor* v. *K. Bari*, 18 Cal. 129.

80. Presumption as to documents produced as record of evidence. Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

(a) that the document is genuine ;

(b) that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and

(c) that such evidence, statement or confession was duly taken.

Cases. This section does not make a document admissible unless it has been taken in accordance with law[1]. A confession recorded by a Magistrate without bearing his certificate stating his belief that it was freely and voluntarily made cannot be admissible in evidence without proof of its having been so recorded[2]. A deposition of a witness is not admissible unless it is proved that the witness was duly sworn and that it was signed by the

[1] *Queen Empress* v. *Viran*, 9 Mad. 224, 227.

[2] *Emperor* v. *Radhe Halwai*, 7 C. W. N. 220.

Judge[1]. The Magistrate recording the confession must be examined to prove it[2].

81. Presumption as to Gazettes, newspapers etc. The Court shall presume the genuineness of every document purporting to be the *London Gazette* or the *Gazette of India*, or the *Government Gazette* of any Local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

82. Presumption as to document admissible in England without proof of seal or signature. When any document is produced before any Court, purporting to be a document which, by the law in force for the time being in England and Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by

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[1] *Ramesh Chandra* v. *Emperor*, 46 Cal. 895; *Elahi Baksh* v. *Emperor*, 45 Cal. 825.

[2] *Emperor* v. *Dhamka Amra*, 16 Bom. L. R. 261 (Contra. *Guja Majhi* v. *King Emperor*, 2 P. R. J. 80).

whom it purports to be signed, the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

83. Presumption as to maps or plans made by authority of Government. The Court shall presume that *maps* or *plans* purporting to be *made by the authority of Government* were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

What facts can a Court presume without proof with regard to maps and plans purporting to be made under the Government?

What is the nature of the presumption that arises under the I. E. Act with regard to maps and plans purporting to be made by the authority of Government and for the purpose of any case?

Sections 36 and 83 compared. Section 36 says that maps or plans made under the authority of Government (as sovereign power) are relevant: section 83 says that such maps or plans purporting to be made by the authority of Government shall be presumed to have been so made and to be accurate, but maps or plans made for the purpose of any cause (by the Government as a party to such cause or by the Government not as a sovereign power, such as the owner of an estate) is not a public document under section 74 and therefore not relevant under section 36 and shall not be proved to be genuine under section 83 unless it is proved under section 67 (as a private document).

Cases. The accuracy of maps or plans, made under the authority of the Government, is presumed[1].

[1] *Rahmatulla* v. *Secretary of State*, P. R. No. 63 of 1913.

Such presumption is not affected even if such map has been superseded by higher authority[1]. Maps and surveys made for revenue purposes are admissible in evidence as correct[2].

84. Presumption as to collections of laws and reports of decisions. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country,

85. Presumption as to powers-of-attorney. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the Government of India, was so executed and authenticated.

Case. The execution of a power-of-attorney may be proved independent of section 85[3].

How may the judgment of a foreign tribunal be

86. Presumption as to certified copies of foreign judicial records. The Court may presume that any document pur-

[1] *Joggessuar Singh* v. *Bycunt Nath*, 5 Cal. 822.

[2] *Jagadindra Nath* v. *Secretary of State*, 30 Cal. 291 P. C.

[3] *In re Sladen*, 21 Mad. 492.

porting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India "in or for" such country to be the manner commonly in use in that country for the certification of copies of judicial records. proved in British India ?

An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefor, as defined in section 3, clause (40), of the General Clauses Act, 1897, shall, for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.

Case. If a person in possession of foreign judicial records is out of reach of, or not subject to, the process of the Court or is the adverse party, a secondary evidence is admissible under sections 65 and 66[1].

87. Presumption as to books, maps and charts. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts, and which is produced for its inspection, was written and published by the person and at

[1] *Haranund Roy* v. *Ram Gopal*, 27 Cal. 639 P. C.

the time and place, by whom or at which it purports to have been written or published.

Sections 36, 83 and 87 compared.

In what cases are statements in maps, charts and plans relevant under section 36 of the I.E. Act and in what cases are such maps or charts to be presumed accurate and in what cases not?

Section 36 says that statements of facts in issue or relevant facts made (a) in published maps or charts generally offered for public sale, or (b) in maps or plans made under the authority of Government are themselves *relevant* facts. Section 83 says that the court shall presume that maps or plans purporting to be made by the Government are accurate. Section 87 says that any published map or chart the statements of which are relevant facts was published by the person and at the time and place by whom or at which it purports to have been published.

From the above it is clear that map or chart which is not published or offered for public sale or made under the authority of the Government can not be presumed to be accurate and it can not be presumed to have been published and made by the *person* and at the time and place, by whom and at which it purports to have been published.

State briefly the provisions with reference to telegraphic messages.

88. Presumption as to telegraphic messages. The Court may presume that a message forwarded from a telegraph office to the person to whom such message purports to be addressed corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

What is the nature of the

89. Presumption as to due execution &, of documents not produced. The

Court shall presume that every document called for, and not produced after notice to produce, was attested, stamped, and executed in the manner required by law.'

presumption as to a document called for and not produced without sufficient cause after notice to produce it?

The Court shall presume that a document was attested, stamped and executed according to law. But it can not presume as to its contents which shall be proved by secondary evidence as provided by section 65, clause (a).

What facts can a court presume without proof, with regard to any document more than thirty years old which is produced from proper custody? State briefly the provisions with reference to ancient documents. How should ancient documents be proved? Explain: "ancient documents" and "proper custody".

90. Presumption as to documents thirty years old. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the hand-writing of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom is purports to be executed and attested.

Explanation.—Documents are said to be in *proper custody* if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81.

ILLUSTRATIONS

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it : the custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession : the custody is proper.

(c) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody : the custody is proper.

Principle. This section is based on the ground that it is very difficult for persons to prove an ancient document after all its witnesses have been dead. It is more expedient to run some risk of deception than to permit injustice by excluding most material evidence.

This section refers to court's presumption as to handwriting, signature, execution, and attestation of documents thirty years old if they are produced from a proper custody. It gives the court a discretion to make such presumption but the discretion should be judicially exercised regard being had to all the circumstances. A document of thirty years old may also be proved according to section 67 or 68.

An "*ancient document*" means a document which is of thirty years old or of more than thirty years old on the day on which it is tendered from the date when the document purports to have been executed.

"Proper custody" of a document means its deposit with a person and in a place, where, if

authentic, it might naturally and reasonably be expected to be found.

The presumption in favour of the originals of documents allowed by this section is applicable to their secondary evidence under section 65, clause (c), if a case is made out to offer such secondary evidence.

Cases. If a document is more than thirty years old, a court can act upon it when it is brought from proper custody and is free from suspicion of dishonesty.[1] A document more than thirty years old and produced from the records of a court can have no legal presumption of its genuineness, unless it is proved that it was filed in that court for adjudication of a question under its cognisance.[2] The court has discretion to act on the presumption under this section or to require the document to be proved in the ordinary manner.[3] An ancient deed of which witnessess are presumed to be dead is presumed to be genuine.[4] The degree of credit to be given to an ancient document depends on the circumstances referable to it.[5] When the original document is proved to have been destroyed and only its certified copy is available, such secondary evidence is admissible to raise the presumption.[6] Proper custody means the possession of a person which does not excite any suspicion of fraud.[7] The origin of the

[1] *Hari Dhangar* v. *Biru Dasru*, 5 B. H. C. 135.

[2] *Gudadhur* v. *Bhyrub*, 5 Cal. 918.

[3] *Musammat Shafiq* v. *Raja Shaban Ali*, 6 Bom. L. R. 750=26 All. 581 (P. C.).

[4] *Govinda Hazra* v. *Protap Narain*, 29 Cal. 740, 747.

[5] *Hari Chintaman* v. *Moro Lakshman*, 11 Bom. 89

[6] *Ishri Prasad* v. *Lalli Jas*, 22 All. 294.

[7] *Doe dem Neale* v. *Samples*, 8 Ad. & El. 151.

custody was alone regarded as material although the document did not change hands with the tranfers of interest.[1] Where a person naturally came into possession of a document but failed to return it after his right to possess it had ceased, his custody was a legal custody.[2]

CHAPTER VI.

OF EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE (SS. 91—100).

Explain fully the provisions of section 91 with exceptions and provisos. Comment. "Oral admissions as to contents of documents are not relevant"

91. Evidence of terms of contracts, grants, and other dispositions of property reduced to form of document. When the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1. When a public officer is required by law to be appointed in writing,

[1] *Tajuddin* v. *Govind*, 27 Bom. 452.

[2] *Shama Charan* v. *Abhiram Goswami*, 33 Cal. 511.

and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2. Wills "admitted to probate in British India" may be proved by the probate.

How can a will admitted to probate be proved when the original can not be produced ?

Explanation 1. This section applies equally to cases in which the contracts, grants, or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one.

Explanation 2. Where there are more originals than one, one original only need be proved.

Explanation 3. The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

ILLUSTRATIONS

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved. Explanation I.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved. Section.

(c) If a bill of exchange is drawn in a set of three, one only need be proved. Explanation II.

(d) A contracts in writing with B for the delivery of indigo upon certain terms. The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion. Explanation III.

Oral evidence is offered that no payment was made for the other indigo: the evidence is admissible.

Explanation III.

(e) A gives B a receipt for money paid by B. Oral evidence is offered of the payment.

The evidence is admissible.

Analysis of the section. Section 91 may be divided into two parts :—

(1) Part I deals with the *terms* of a contract, or of a grant, or of any other disposition of property which have been reduced to the form of a document. It refers to matters which are *not necessary* to be reduced to the form of a document.

(2) Part II deals with all matters which the law requires to be reduced to the form of a document. It refers to matters which *must* be reduced to the form of a document.

Scope and Operation. When the matters to be proved are principal matters in issue, this section excludes oral evidence. But, if the matter is collaterally relevant in a case, such matter may be proved by oral evidence. This section *operates subject to section 65.*

This section is based on the principle that the *best* evidence, of which the case in its nature is susceptible, should always be presented. It is designed to prevent the introduction of fraud.

Cases. Oral evidence was admissible to prove the rate of rent although a Kabuliyat executed by the defendant was inadmissible for want of registration.[1] An oral evidence to prove the facts of payment is admissible though it can not prove the contents of a receipt.[2] Oral

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[1] *Amir Ali*, 41 Cal. 347.

[2] *Waman* v. *Dhondiba*, 4 Bom. 126.

evidence to prove the contents of a lost note was not admissible without proof of its loss.[1] Oral evidence was admissible to prove the passing of consideration although the suit was on an unstamped promissory note.[2] Proof of lease is not necessary to prove a tenancy.[3] This section does not exclude secondary evidence admissible under section 65.[4] The fact of partition may be orally proved though it was reduced into a deed not registered.[5] Mere rough note written by a third person for the maintenance of the wife and not signed by the parties is not a writing within the meaning of this section.[6] A contract of sale can be proved by parol evidence.[7]

If the parties reduced into writing all the terms of a contract as they intended to do, no parol evidence is admissible. But, if they intentionally left out a portion of the terms, they are entitled to give parol evidence.[8] Parol evidence is admissible to show that the lands intended to be sold bore different survey numbers from the numbers

[1] 5 A. L. J. 162.

[2] *Gulabchand*, 3 Cal. 314 ; *Hiralal* v. *Daludin*, 4 All. 135.

[3] *Yeshodabai* v. *Ramchandra*, 18 Bom. 66.

[4] *Siraj Hussain* v. *Bulakiram*, 5 A. L. J. 162.

[5] *Chhotralal* v. *Barmaahkorey*, 41 Bom. 466.

[6] *Meherally*, 7 Bom. L. R. 610.

[7] *Durga Prasad* v. *Shajanlal*, 31 Cal. 614.

[8] *Jumna Doss* v. *Srinath Roy*, 17 Cal. 176; *Sangam Lal* v. *Mussammat Sikandar Jehan Begam*, P. R. No. 183 of 1889 (F. B.)

mentioned in the sale deed.[1] When the matter reduced into writing is not to be proved by the writing, this section is not applicable.[2] Oral evidence is admissible to show that the party liable on the contract contracted for himself and for his partners.[3] Oral evidence is not admissible to prove that the party liable on the contract contracted as an agent for another.[4] Parol evidence is not excluded to prove the terms of a petition of complaint and the examination of the complainant under section 200 of the Criminal Procedure Code, and they may be admissible as dying declarations under section 32, clause (1).[5] According to illustration (e), parol evidence is admissible to prove payments in satisfaction of a registered mortgage bond although an unregistered receipt to prove such payment is not admissible under this section.[6] Oral evidence to prove the delivery of the goods sold and their value was admissible although an unstamped receipt of the defendant for such delivery was rejected.[7] Oral evidence was admissible in proof of marriage although verbal evidence to prove the contents of

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[1] *Karuppa Goundan* v. *Periathambi Goundan*, 30 Mad. 397.

[2] *The Public Prosecutor* v. *Sarabu Chennayya*, 33 Mad. 413.

[3] *Venkatasubbiah Chetty* v. *Govindarajulu Naidu*, 31 Mad. 45.

[4] *Ebrahimbhoy Pabaney Mills Co.* v. *Hassan Mamooji*, 23 Bom. L. R. 767.

[5] *Gouridas Namasudra* v. *Emperor*, 36 Cal. 659.

[6] *Dalip Singh* v. *Durga Prasad*, 1 All. 442; *Sharaf Ali* v. *Jagandar Singh*, (1916) P. R. No. 98 of 1916.

[7] *Binja Ram* v. *Rajmohun*, 8 Cal. 282.

the marriage register was rejected.[1] Oral evidence was admissible to prove that money was lent or goods were sold when the transaction was complete and then a note was given for repayment of the money or for payment of the price of the goods sold, although such note was not admissible for want of stamp.[2] When the original cause of action was the note itself, oral evidence was inadmissible, and the note, not being stamped, was also inadmissible.[3] Oral evidence was admissible to prove that money was lent on a *hatchitta* although it, bearing insufficient stamp, was rejected.[4] Where there was an independent admission of a loan, oral evidence to prove the passing of consideration might be admissible although the bill or note was not admissible for defects.[5] A suit brought on a *hundi*, which was not admissible for want of stamp, could not be proved by oral evidence.[6] Oral evidence was excluded to prove a loan which was made in the morning and a promissory note was granted therefor by the defendant in the afternoon on an unstamped paper. This was consequently inadmissible in evidence.[7] Where a creditor has a cause of action independent of

[1] *Balbhadar* v. *the Maharaja of Bethia*, 9 All. 351, 356.

[2] *Sheikh Akbar* v. *Sheikh Khan*, 7 Cal. 256. 259.

[3] *Radhakant* v. *Abhoychurn*, 8 Cal. 721; *O'Gorman* v. *Maktab Singh*, P.R. No. 92 of 1898.

[4] *Pramatha Nath* v. *Dwarka Nath*, 23 Cal. 851.

[5] *Chenbasapa* v *Lakshman*, 18 Bom. 369; *Krishnaji* v. *Rajmal*, 24 Bom. 360.

[6] *Valiappa Ravuthan* v. *Mahommed*, 5 Mad. 166.

[7] *Pothi Reddi* v. *Velayudasivan*, 10 Mad. 94 (Contra. *Krishnasami* v. *Rangasami*, 7 Mad. 112; *Ramachandra* v. *Venkataramana*, 23 Mad. 527.

the promissory note executed by the defendant for the debt, oral evidence in proof of the debt was admissible although the promissory note was inadmissible in evidence for some defect.[1] Where the promissory note can be treated as a collateral security for the money advanced, oral evidence to prove the advance of the consideration is admissible.[2] Secondary evidence to prove the contents of the original *hundis* returned to the defendants was admissible to prove the loan although the renewed *hundis*, not being stamped, were inadmissible.[3] Oral evidence to prove a *confession* of guilt before a Magistrate is excluded by this section.[4] Oral evidence as to confession of a guilt by a Peshkar in a departmental inquiry by a Magistrate was admissible as it did not offend against this section.[5]

Explain fully the provisions of section 92 with exceptions and provisos.. What is the nature of the documents whose terms may not be varied or contradicted by any oral

92. Exclusion of evidence of oral agreement. When the terms of any such contract, grant, or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the persons to any such instrument or their representatives in interest, for the purpose

[1] *Ram Sarup* v. *Jasodha*, 34 All. 158 (Overruling 26 All. 178).

[2] 9 All.. 351 ; *Banarsi Prasad* v. *Fazal Ahmad*, 28 All. 298.

[3] *Jaganprasad* v. *Indar*, 36 All. 259.

[4] *Emperor* v. *Maruti Santu*, 21. Bom. L.R. 1065.

[5] *Emperor* v. *Haidar Raza*, 36 All. 222.

of contradicting, varying, adding to or subtracting from, its terms.

Proviso (*1*). Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (*2*). The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (*3*). The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant, or disposition of property, may be proved.

Proviso (*4*). The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which such contract, grant, or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

evidence? Are there any exceptions to this rule? Enumerate the rule laid down in I.E Act regarding exclusion of evidence of oral agreement which would affect or vary the terms of a document. By section 92 no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from, its terms subject to the exceptions contained in the several provisos. Illustrate this by reference to one leading decision. In what cases

is oral evidence admissible to explain the contents of a document? (See provisos to section 92, and sections 95, 96, 97 and 99). What are the exceptions to the rule that parol testimony cannot be received to contradict or vary the terms of a valid written instrument?

Proviso (5). Any usage or custom, by which the incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6). Any fact may be proved which shows in what manner the language of a document is related to existing facts.

ILLUSTRATIONS

Section.

(a) A policy of insurance is effected on goods 'in ships from Calcutta to London.' The goods are shipped in a particular ship which is lost. The fact, that that particular ship was orally excepted from the policy, can not be proved.

Section.

(b) A agrees absolutely in writing to pay B Rs. 1,000 on the first March, 1873. The fact that, at the same time, an oral agreement was made that the money should not be paid till 31st March, can not be proved.

Section.

(c) An estate called 'the Rampur Tea Estate' is sold by a deed which contains a map of the property sold. The fact that land not included in the map had always been regarded as part of the estate, and was meant to pass by the deed, can not be proved.

Proviso I.

(d) A enters into a written contract with B to work certain mines, the property of B, upon certain terms: A was induced to do so by a misrepresentation of B as to their value. This fact may be proved.

(e) A institutes a suit against B for the specific performance of a contract, and also prays that

the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake : A may prove that such a mistake was made as would by law entitle him to have the contract reformed. Proviso I.

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price : A may show that the goods were supplied on credit for a term still unexpired. Proviso II.

(g) A sells a horse, and verbally warrants him sound. A gives B a paper in these words—"Bought of A a horse for Rs. 500". B may prove the verbal warranty. Proviso II.

(h) A hires lodgings of B, and gives B a card on which is written—" Rooms, Rs. 200 a month ". A may prove a verbal agreement that these terms were to include partial board. Proviso II.

A hires lodgings of B for a year, and a regularly stamped agreement, drawn up by an attorney, is made between them. It is silent on the subject of board. A may not prove that board was included in the terms verbally.

(i) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount, A may prove this. Proviso I.

(j) A and B make a contract in writing, to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it. A may show the circumstances under which it was delivered. Proviso III.

Analysis. Section 92 may be divided into two parts :—

(1) Part I deals with contract, grant or other

dispositions of property which have been proved according to the provisions of section 91.

(2) Part II deals with matters which are compulsorily to be reduced to the form of a document.

Scope. Questions under section 92 arise when a document is proved according to section 91. Section 92 is limited to questions which arise between the parties to such contract, grant or disposition of property or matters required by law to be reduced to the form of a document and between their representatives. The *object* of this section is to avoid fraud and mistake. So, provisos have been made to this section to avoid such fraud and mistake.

Sections 91 and 92 compared. Section 92 is virtually *supplementary* to section 91 and is included in the latter by implication. The provisos to section 92 serve as *exceptions* to section 91 as well.

How far is evidence of subsequent conduct and oral evidence proving a contemporaneous agreement admissible to prove that a document in form of a sale deed is in reality a deed of mortgage? Is oral evidence admissible to show that a deed of sale is in reality a deed of gift?

No evidence of any oral agreement or statement shall be admitted etc. In *Hanifunnisa* v. *Faizunnisa* (15 C. W. N. 521, P. C.), it has been held that parol evidence is admissible to prove that a document purporting to be a deed of sale was in reality intended to operate as a gift.

In 28 Cal. 256, it has been held that the case of *Balkissen* v. *Legge* (which excluded oral evidence as to intention of parties) does not affect the Full Bench case in 25 Cal. 603, as there is a clear distinction between oral evidence of intention and oral evidence as to acts and conduct of parties. The ruling in 33 All. 340, P. C. also supports the above distinction and makes the oral evidence as to acts and conduct of parties admissible to determine the nature of the document.

From the above, it follows that oral evidence as to acts and conduct of the parties may be admissible to show that a deed of sale is in reality a deed of mortgage or that a deed of sale is in reality a deed of gift.

But, in *Maung Kyin v. Ma Shwe La* (20 Bom. L. R. 278, P. C.=44 I. A. 286), the Privy Council has expressly overruled the decisions of the Calcutta High Court and approved those of the Bombay and Madras High Courts which have held that acts and conduct of parties subsequent to a conveyance (transaction) of sale are not admissible to prove that the transaction is in reality a mortgage.

What was laid down by the Privy Council in the case of *Balkissen v. Legge*? Does that decision exclude evidence as to acts and conduct of parties.? Is evidence of conduct admissible to show that the transaction is not what it purports to be? When is oral evidence admissible to contradict or vary a document and when not? Give example.

Problems. (1) At the time of the execution of a conveyance for a garden, the purchaser executed an agreement in his vendor's favour to resale the garden to him at a stated price within a stated time. The purchaser was put in possession. Without exercising his right of purchase according to the agreement and after expiry of the time provided for the purpose, the vendor instituted a suit against the purchaser for redemption of the garden upon the alleged basis of a mortgage with possession by way of conditional sale. At the trial the vendor seeks to adduce oral evidence in support of his allegations in variation of the terms set forth in the documents. How far is he entitled to do so?

Answer. According to the rule in 33 All. 340 P. C., oral evidence of acts and conduct of parties is admissible to show the real nature of the document. But, in this case, the vendor did not exercise his right of purchase according to the agreement executed by the purchaser and after the expiry of the time for his doing so as mentioned in the agreement. The purchaser was also put in possession. From these circumstances it is clear that the conveyance was really a deed of sale and not a mortgage by conditional sale, and the agreement shows that the vendor had a right to repurchase but he did not exercise that right. Upon the facts found, he is

not entitled to adduce oral evidence to contradict both the conveyance and the agreement.

(2) Parties enter into a sale deed with a *contemporaneous* oral agreement to treat it as a mortgage. Is it open to any of the parties to plead the oral agreement? The *answer* is in the negative. *Proviso* (*2*) excludes such agreement.

(3) A institutes a civil suit against B for the recovery of a property which A alleges that B sold to him along with other properties by a conveyance which has accidentally omitted to mention the property X but in which conveyance a blank space has been left which it is alleged by A that B intended to fill up by inserting the description of the property X. A says that he holds letters from B showing that he intended to convey to A the property X along with other properties mentioned in the deed. Can A prove those letters in a suit against B? Give reason.

Answer. According to *proviso* (*1*), A is entitled to show by those letters that by mistake the property X was not entered in the conveyance.

Cases. After the execution of a mortgage, the parties verbally agreed to put the land in possession of the mortgagee in payment of the mortgage money. This section does not exclude such evidence.[1] If the original contract requires writing or if it requires registration, *proviso* (*4*) excludes oral evidence. When the instrument is executed by the transferor only, the statement of the consideration is not one the terms of the grant so as to exclude oral evidence to prove it.[2] The statement of price is one of the terms of a sale and it can

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[1] *Kamala Sahai* v. *Babu Nandanmian*, 11 Cal. L.J. 39.

[2] *Challabenkanta Reddy*, (1912) I.M.W.N. 164.

not be proved by oral evidence varying such term.[1] Oral evidence is admissible to prove some items of an agreement not entered into letters exchanged between the parties, because the Statute of Frauds is not applicable in India and this section also does not exclude such evidence.[2] A receipt showing satisfaction of a registered mortgage deed at the calculation of a simple interest is admissible to evidence such satisfaction notwithstanding the stipulation for compound interest in the deed.[3] Parol evidence is always admissible to prove that the transaction is bad for failure of consideration.[4] This section is not applicable to documents not between the two parties.[5] When the question is between the parties to a written document and a third person, this section has no application.[6] The parties to a document can not avoid the effect of this section to defeat a third party.[7] An oral agreement to prove that a right of way was reserved over one of the two premises at the time of their partition is not admissible.[8] This section does not exclude oral evidence when a third party tenders it.[9] A man can not set up his own or other party's fraud in so far as it helps him.[10] Oral evidence is

[1] *Aditayam Iyer*, 25 M.L.J. 602 ; *Mottayppan*, 38 Mad. 226.

[2] *Ambica Prasad*, 13 C.W.N. 326.

[3] *Mulchand* v. *Madho Ram*, 10 All. 421.

[4] *Pattamal* v. *Sayad Kalav*, 27 Mad. 529.

[5] *Kailaschandra*, 42 Cal. 546.

[6] *Laxmibai* v. *Kerhav*, 18 Bom. L. R. 134.

[7] *Gangabai* v. *Pondo*, 4 Nag. L. R. 115.

[8] *Krishna Marazau* v. *Naraj*, 28 Mad. 497.

[9] *Maung Kyin* v. *Ma Shwe La*, 45 Cal. 320, P. C.

[10] *Forbes* v. *Amirunissa*, 10 M. I. A. 356.

admissible to prove that the consideration stated in the deed to have been paid was not really paid but not to prove that a small portion of it was paid.[1] It is open to a party to prove that the consideration has failed or is entirely different from what is recited in the deed.[2] This section together with section 31 of the Specific Relief Act entitles a party to protect his right by proving a mistake in a written contract.[3] Oral evidence is admissible to show that the transaction is benami.[4]

This section should not be strictly construed so as to encourage a fraud.[5] It excludes oral evidence to prove that one of the executants of the note was a surety merely.[6] Oral evidence may be admissible to prove payment of interest if the document is silent on the point.[7] Contemporaneous oral agreement providing for the means of payment may be proved.[8] Parol evidence is admissible to prove some of the terms which were not intended to be reduced into writing.[9] This section has no application where the parties admit the existence of an oral agreement.[10] Benami

[1] *Shewal Singh*, 6 W. R. 267; *Gopal Singh*, 10 C. L. J. 27.

[2] *Lala Himat* v. *Lewellyl*, 11 Cal. 486; *Indraji* v. *Lalchandra*, 18 All. 168, 273, P. C.

[3] *Rangasami* v. *Souri*, 39 Mad. 792.

[4] *Kumaara*, 4 Mad. 231.

[5] *Venkatram*, 13 Mad. 494; *Preonath*, 29 Cal 603.

[6] *Narasinga*, 24 M. L. J. 91.

[7] *Soudamoni Debi* v. *Spalding*, 12 Cal. L. R. 163.

[8] *Rambux*, 9 All. 392; *Mayen* v. *Alston*, 16 Mad. 238; *Cowasji* v. *Barjorji*, 12 Bom. 335; *Cutts* v. *Brown*, 6 Cal. 328.

[9] *Jumna Doss* v. *Srinath Roy*, 17 Cal. 176, 177.

[10] *Satyesh Chunder* v. *Dhunpat Singh*, 24 Cal. 20.

character of transaction can be proved by oral evidence.[1] A third party is entitled to show a contemporaneous agreement varying the terms of the written document under section 99.[2] The plaintiff could show that he was the real purchaser although the sale certificate showed that both the plaintiff and the defendant were the purchasers.[3] The plaintiff could show that he was a surety in executing a mortgage bond jointly with his sisters in a suit against such sisters.[4] Oral evidence was admissible to show that a third person's property was conveyed in fraud of him between the vendors and the purchasers although the vendors had only a mortgage right of such property.[5] This ruling expressly overruled the decisions of the Calcutta High Court and approved those of the Bombay and Madras High Courts which held that acts and conduct of parties subsequent to a conveyance of sale were not admissible to prove that the transaction was in reality a mortgage.

A stipulation to repurchase the property sold by a conveyance does not convert it into a mortgage.[6] The intention of the parties must be gathered from the language of the document in the light of the surrounding circumstances to construe a document.[7] No oral evidence is admissible to

[1] *Richard Taylor* v. *Raja of Parlakimedi*, 32 Mad. 443.

[2] *Bageshri Dayal* v. *Pancho*, 28 All. 473.

[3] *Mulchand* v. *Madho Ram*, 10 All. 421.

[4] *Shamsh-ul-Jahan Begam* v. *Ahmad Wali*, 25 All. 337.

[5] *Maung Kyin* v. *Ma Shwe La*, 20 Bom. L.R. 278, P.C.

[6] *Bhagwan Sahai* v. *Bhagwan Din*, 17 I.A. 98.

[7] *Jhanda Singh* v. *Sheikh Wahiduddin*, 19 Bom. L. R. 1, P. C.

vary the terms of a written contract between the parties who claim through one and the same person.[1] Oral evidence is inadmissible to prove that a deed of sale was a deed of gift.[2]

According to *proviso* (*1*), any fact may be proved which would invalidate a document.[3] An executant can not prove that the document is to take effect after his death.[4] In the absence of fraud, it is not open to the parties to prove a contemporaneous oral agreement to reconvey the property sold on payment of the sum advanced.[5] Extraneous oral agreement to prove a fraud subsequent to the document is not admissible to invalidate it.[6] Unlawfulness of consideration will invalidate a document whether it is pleaded or not.[7] If a consideration is unlawful in part and the unlawful portion cannot be separated from the rest, a suit must fail on a document based on such consideration.[8] Oral evidence was admissible to prove the fraudulent character of a transaction between the parties.[9]

Proviso (*2*). Oral evidence of an agreement to prove a collateral matter is admissible when it affects the written document.[10] Contemporaneous

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[1] *Pathammal* v. *Syed Kalai Ravathai*, 27 Mad. 329.

[2] *Faizun-nissa* v. *Hanif-unnissa*, 27 All. 612.

[3] *Beni Madhab* v. *Sadasook*, 32 Cal. 437, F.B.

[4] *Mothayappan* v. *Palani Goundan*, 38 Mad. 226.

[5] *Sangira Malappa* v. *Ramappa Sangappa*, 11 Bom. L.R. 1130.

[6] *Keshavrao* v. *Raya*, 8 Bom. L.R. 287.

[7] *Hill* v. *Clarke*, 27 All. 266.

[8] *Balgobind* v. *Bhaggu Mal*, 35 All. 558.

[9] *Kashi Nath* v. *Brindan*, 10 Cal. 649.

[10] *Motabhoy Mulla* v. *Mulji Hari Das*, 39 Bom. 399, P.C.

oral agreement to pay interest on a *hundi* which is silent as to interest is inadmissible. In such cases, the payee is entitled only to interest at 6 p. c. per annum under section 80 of the Negotiable Instruments Act.[1] Oral evidence to prove that the instalment of a hypothecation bond was to be satisfied out of the hypothecated property was admissible.[2]

Proviso (*3*) means that the instrument is not to operate until the happening of a given condition and it can not be shown by parol evidence that the instrument will be void on the happening of a given event.[3]

Proviso (*4*) is applicable to any agreement whether executed or executory. Only those agreements which affect the terms of the previous transaction by way of rescinding or modifying the same are admissible.[4] A subsequent oral agreement to take less than what is due under a registered mortgage bond is not admissible.[5] Oral evidence is admissible to prove the satisfaction of a mortgage bond.[6] This *proviso* does not exclude a subsequent oral agreement substituting a new contract for one reduced into writing and registered by way of novation of contract but excludes only subsequent oral agreement to rescind or modify

[1] *Fathurona Bivi* v. *Hanumatha Row*, 17 M.L.J. 296 (Contra. 12 C.L.R. 163).

[2] *Ram Bakhsh* v. *Durjan*, 9 All. 392.

[3] *Ali Jawad*, 44 All. 421 (See *Ramjibun* v. *Oghore Nath*, 25 Cal. 401)

[4] *Goseti Subba* v. *Varigonda Narasimhan*, 27 Mad. 368.

[5] *Mallappa* v. *Malum Nagu*, 42 Mad. 41, F. B.

[6] *Ramlal* v. *Govinda*, 4 C. W. N. 304.

such written contract.[1] An oral agreement to forbear for four days from bringing the mortgaged property to sale was admissible.[2] Evidence of an oral agreement was excluded to renew the lease by the covenant for renewal in the written lease.[3]

Proviso (5). Unreasonable and illegal incidence can not be annexed to a contract by the evidence of usage under this *proviso*.[4] Usages of particular market or place not expressly mentioned in any contract, oral or written, may be proved.

Proviso (6). Where the terms of a document require explanation, an extraneous evidence is admissible.[5] Evidence is not admissible to prove facts exactly opposite to what the language of the document purports to mean.[6] If there is a latent ambiguity in the deed, the subsequent conduct of the party may be looked into in order to ascertain to what person or things the language of the document was intended to apply.[7]

State the rules as to the exclusion and admission of evidence to

93. Exclusion of evidence to explain or amend ambiguous document. When the language used in a document is, on its face, ambiguous or defective, evidence may

[1] *Jaggat Singh* v. *Devi Ditta*, P. R. No. 169 of 1883.

[2] *Trimbak Gangadhar* v. *Bhagwandas*, 23 Bom. 348.

[3] *Mark D'Cruz* v. *Jitendra Nath*, 46 Cal. 1079.

[4] *Lu Gale* v. *Maung Mo*, (1904) 2 L. B R. 268.

[5] *Ganpatrao Apaji* v. *Bapu Tukaram*, 22 Bom. L. R. 831.

[6] *Simla Bank Corporation Ltd* v. *Ball*, P. R. No. 2 of 1884.

[7] *Subramania* v. *Raja Rajeshwara*, 40 Mad. 1016.

not be given of facts which would show its meaning, or supply its defects.

ILLUSTRATIONS

(a) A agrees, in writing, to sell a horse to B for Rs. 1000 or Rs. 1500.

Evidence can not be given to show which price was to be given.

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

Problem. A donor gives a property to "A and —" by a deed of gift. Evidence can not be given as to whom the donor meant by —.

Cases. Section 93 deals with patent ambiguities and excludes oral evidence. Where a *kabuliyat* is silent as to interest monthly or annually, no oral evidence is admissible to supply the deficiency[1]. If the language of a deed is ambiguous, no evidence to clear the ambiguity is admissible[2].

94. Exclusion of evidence against application of document to existing facts. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

ILLUSTRATION

A sells to B, by deed, "my estate at Rampur containing 100 bighas." A has an estate at Rampur

[1] *Protap Chandra Laha*, 18 C. W. N. 592.

[2] *Deofit* v. *Pitambar*, 1 All. 275.

containing 100 bighas. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Case. Section 94 excludes oral evidence when the language of a document properly applies to the existing facts in their ordinary sense. The intention of the parties should be gathered from the language of the document and not from the surrounding circumstances[1].

When is extrinsic evidence admissible under the Indian Evidence Act? (See ss. 95-98.)

95. Evidence as to document unmeaning in reference to existing facts. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

ILLUSTRATION

A sells to B, by deed, "my house in Calcutta."

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

Explain and illustrate the maxim *"Falsa demonstratio nonnocet*

Imperfect description. This section formulates the general rule with regard to imperfect obligations embodied in the maxim *"falsa demonstratio non nocet"* i. e. a false description does not vitiate the document. Oral evidence is, therefore, admissible. Thus, where a deed of release was

[1] *Babu* v. *Sitaram*, (1901) 3 Bom. L. R. 768; *Mt. Bhagbutdebi* v. *Chodhri Bholanath*, L. R. 21, A. 256 (P. C.)

silent as to the claim released, it was held that under section 95 extrinsic evidence was admissible to prove what claim was intended to be released by it. - *Abraham* v. *The Lodge 'Goodwill'* (1910), 34. M. 156.

Cases. Sections 95-97 refer to *latent* ambiguities and admit oral evidence to clear them up. Section 95 refers to cases where the language of the document is plain enough but is unmeaning in reference to existing facts. A sells to B by a deed his house in Bombay. He has no house in Bombay but has a house in Calcutta. Oral evidence is admissible to prove it[1]. Oral evidence is admissible to prove whether the interest was to be calculated annually or monthly where the hand-note is silent on the point[2].

96. Evidence as to application of language which can apply to one only of several persons. When the facts are such that the language used might have been meant to apply to anyone, and could not have been meant to apply to more than one, of several persons or things, evidence may be given of facts which show which of those persons or things it was intended to apply to.

ILLUSTRATIONS

(a) A agrees to sell to B, for Rs. 1000, "my white horse." A has two white horses.

Evidence may be given of facts which show which of them was meant.

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[1] *Mahabir Prasad* v. *Masiatullah*, (1915) 38 All. 103; *Karuppa Goundan* v. *Periathambi Goundan*, (1907) 30 Mad. 397; *Santaya* v. *Savitri*, 4 B. L. R. 871.

[2] *Manmatha Nath*, 14 C. W. N. 1100.

(b) A agrees to accompany B to Haiderabad Evidence may be given of facts showing whether Haiderabad in the Dekhan or Haiderabad in Sindh was meant.

97. Evidence as to application of language to one of two sets of facts, to neither of which the whole correctly applies. When the language used applies partly to one set of existing facts and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

ILLUSTRATION

A agrees to sell to B "my land at X in the occupation of Y". A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence many be given of facts showing which he meant to sell.

98. Evidence as to meaning of illegible character &c. Evidence may be given to show the meaning of illegible or not commonly intelligible characters of foreign, obsolete, technical, local and provincial expressions of abbreviations and of words used in a peculiar sense.

ILLUSTRATION

A, a sculptor, agrees to sell to B "all my mods." A has both models and modelling tools. Evidence may be given to show which he meant to sell.

Exclusion and admission of evidence to explain and amend documents. Sections 93 and 94 speak of patent ambiguities which can not be cleared up by extrinsic evidence. Sections 95-98 speak of latent ambiguities which may be cleared up by extrinsic evidence.

State the rules as to the exclusion and admission of evidence to explain and amend documents. When is evidence admissible to explain an ambiguity and when not? Give examples. Explain the distinction between patent and latent ambiguity in a document, and discuss the admissibility of extrinsic evidence to remove such ambiguity.

A patent ambiguity in a document means an ambiguity or defect which appears by simply reading the document. But a latent ambiguity in a document consists in some extrinsic circumstances which require explanation on the maxim *"falsa demonstratio non nocet"*. The illustration to section 97 explains this maxim.

99. Who may give evidence of agreement varying terms of document. Persons, who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

ILLUSTRTION

A and B make a contract in writing that B shall sell A certain cotton to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not not be shown as between A and B, but it might be shown by C, if it affected his interest.

Case. In a pre-emption suit, the plaintiff may prove by extraneous evidence that the deed of alienation was a deed of sale and not a deed of gift or mortgage as the parties to it wanted to show.[1]

[1] *Tara Chand* v. *Baldeo*, P. R. No. 117 of 1890, F. B.

100. Saving of provisions of Indian Succession Act relating to Wills. Nothing in this Chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of Wills.

Do sections 91-99 govern the construction of wills?

Sections 91-99 do not affect the provisions of the Indian Succession Act of 1865 regarding the construction of *wills*. In construing *wills*, the intention of the testator is primarily looked into.

PART III.

Production and Effect of Evidence.

CHAPTER VII.

OF THE BURDEN OF PROOF (SS. 101—114)

101. Burden of Proof. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

* * *

What is meant by "burden of proof"?

When a person is bound to prove the existence of any fact, it is said that the "*burden of proof*" lies on that person.

ILLUSTRATIONS

State some rules to determine which of the

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

contending parties to a suit shall prove the relevant facts. Sections 101-104.

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B, by reason of facts which he asserts, and which B denies, to be true.

A must prove the existence of those facts.

Criticise the rule that the *onus probandi* is upon the party who affirms and not upon the party who denies.

Principles. *As it is difficult to prove negative by direct and simple proof*, the onus to prove the affirmative is thrown on the person who makes the affirmative statement. It is also very reasonable and just that a person who wants to move the Court must establish a *prima facie* case and can not take advantage of the weakness of his adversary's case. He must stand or fall on the strength of his own right and clearness of his own proof.

Cases. This section means that the person on whom the onus lies is to produce evidence sufficient to form the basis of a judgment in his favour when such evidence is not sufficiently rebutted.[1] The onus *probandi* was shifted from the defendant who pleaded failure of consideration to the plaintiff on the former's showing that the mortgaged land of usufructuary mortgages was in possession of the mortgagor till the period of limitation was about to expire.[2]

Shifting of evidence.

102. On whom burden of proof lies. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

* * *

What are the general principles regulating the burden of proof? Illustrate

[1] *Unkar Nath* v. *Milthu Lal*, 18 A. W. N. 107.

[2] *Bihari* v. *Ram Chandra*, 33 All. 483.

your answer by examples.

ILLUSTRATIONS

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

The general principles with regard to the burden of proof may be stated to be that a party who desires to move the court must prove all facts necessary for that purpose. Illustrate. (Ss. 101 104.)

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore, the burden of proof is on A.

(b) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved.

Therefore, the burden of proof is on B.

How has burden of proof to be discharged ? Explain fully "the *onus probandi* lies on the party who substantially asserts the affirmative of the issue." (Ss. 102-104)

How has burden of proof to be discharged ? The burden of proof is discharged or satisfied by the party on whom such burden lies according to the general or special rules regarding the burden of proof, if he adduces oral or documentary evidence of relevant facts to start a *prima facie* case. Unless such evidence is rebutted, the burden is said to have been discharged by such party and the Court is bound to decide in his favour the point at issue which calls for the discharge of such burden.

Under what circumstances may burden of proof be shifted ?

Under what circumstances may burden of proof be shifted ? The plaintiff alleges two facts on which his claim is founded and the truth of the second point is presumed from the proof of the first. The defendant denies both the points. If the plaintiff succeeds in establishing the first point, the burden of proving the other point is shifted on the defendant.

A sues B on a bond alleging that B executed the bond and received its consideration money. B denies the execution and receipt of consideration money and pleads coercion. A succeeds in discharging the burden as to the execution of the bond by B. The burden is shifted on B to prove that he did not receive the consideration money or that the bond was executed under coercion. If B fails to discharge the burden, the suit will be decreed even if A fails to prove the passing of the consideration. Again, if the person on whom the burden lies starts a *prima facie* case, it is ordinarily said that the burden has been shifted for rebuttal on his adversary.

Cases. A party may shift the burden by proving facts giving rise to a presumption in his favour.[1] The plaintiff must place before the Court legal and satisfactory evidence and not matters of suspicion and plausible conjecture against his adversary's case.[2] The plaintiff alleged that the defendant had stolen away the bond in suit. The defendant admitted the execution but pleaded its payment and return of the bond to him. The onus is on the defendant to begin and prove payment.[3] The onus is on the plaintiff to prove the genuineness of the mortgage in a suit for land against a *bona fide* purchaser for value.[4] The onus to prove fraud is on the person who alleges it.[5]

[1] *Mano Mohun* v. *Mathura*, 7 Cal. 225.

[2] *Ramabai* v. *Ramchandra*, 7 Bom. L. R. 293.

[3] *Chuni Kuar* v. *Udai Ram*, 6 All. 73.

[4] *Brajeshware* v. *Budha-nuddi*, 6 Cal. 268.

[5] *Mahomed Golab* v. *Mahomed Sulliman*, 21 Cal. 612.

Upon whom does burden of proof ordinarily lie? Ss. 101-104. Mention the exceptions to the rule that the burden of proof lies on the party who asserts the affirmative of the question in dispute.

103. Burden of proof as to particular fact. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

ILLUSTRATION

A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

104. Burden of proving fact to be proved to make evidence admissible. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

ILLUSTRATIONS

(a) A wishes to prove a dying declaration by B. A must prove B's death.

(b) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

Are there any exceptions to the general rule that a party who desires to move the Court must prove all facts necessary for that

105. Burden of proving that the case of accused comes within exceptions. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of

the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

purpose. Sections 105-113.

ILLUSTRATIONS

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

In what cases can the burden of proof be thrown on the accused in a criminal trial? State the provisions relating to burden of proof in criminal cases.

The burden of proof is on A.

(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section 325 of the Indian Penal Code provides that, whoever, except in the case provided for by section 335, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section 325.

The burden of proving the circumstances bringing the case under section 335 lies on A.

Cases. In *criminal* cases, the general rule is that the burden of proving facts to bring the charge home to the accused lies on the prosecution. But the onus lies on the accused it he wants to bring the case within any of the general exceptions in the Indian Penal Code or in any other law.[1] The burden of proving the loss of self-control,[2] exemption from criminal responsibility by reason of

[1] In re *Shibo Prasad*, 4 C. 124.

[2] *R* v. *Devji Govindji*, 20 B. 215. 223.

unsoundness of mind,[1] good faith,[2] the acceptance of risk by the person injured,[3] and the like, lies upon the accused.

Enumerate the instances in which the burden of proof is determined in particular cases not by the relation of the parties but by presumption. Sections 106—114.

106. Burden of proving fact especially within knowledge. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

ILLUSTRATIONS

(a) When a person does an act with some intention other than that which the character and the circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

According to section 106, a party has to prove a fact which is especially within its knowledge. According to sections 107-113, there is a presumption of law to determine the burden of proof regarding different matters. According to section 114, there is a presumption of fact which the Court may or may not accept according to its discretion. Thus sections 106–114 are *exceptions* to the general rule that *the burden of proof rests with the party who asserts the substantial affirmative.*

Cases. Sales of consignments entrusted to commission agents, and particulars of those sales, are matters which lie especially within their

[1] *R.* v. *Niaz Ali*, A. W. N. 2.

[2] *R.* v. *Balkrishna Vithal*, 17 B. 573, 577, 579; *R.* v. *Dhun Singh*, 6 A. 220, 222.

[3] *Sukaroo Kabiraj* v. *R.*, 14 C. 566, 568, 569.

knowledge.[1] The onus of proving the value of "circumstances and property within the municipality" is on the latter as a fact especially within its knowledge.[2]

* * *

State the provisions of the I. E. Act regulating the onus of proof as to the question whether a person is alive or dead. (Ss. 107-108)

107. Burden of proving death of person known to have been alive within thirty years. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.

108. Burden of proving that person is alive who has not been heard of for seven years. Provided that, when the question is, whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is *shifted* to the person who affirms it.

Under what circumstances may the burden of proof be shifted?

Problem. P, the reversioner to the estate of X, became a *sanyasi,* had not been heard of for 9 years, and no proof of his being alive was forthcoming. X's widow who was in possession of his estate aliented a portion, and the reversioner next after P instituted a suit to avoid the alienation. The defence was that the plaintiff could not maintain the suit as he was not the next reversionary heir, since P's death had not been proved. Indicate the points that are open to the plaintiff in support of his claim

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[1] *Mayen* v. *Alston*, 16 Mad. 238, 245; *Barlow* v. *Chuni Lall*, 28 C. 209.

[2] *Deb Narain Dutt* v. *Chairman of the Baruipore Municipality*, 41 C 168 (1914).

Answer. As P had not been heard of for more than 7 years and as the defendant did not prove that he had been alive, the death of P shall be presumed, and the plaintiff, therefore, becomes the next reverionary heir to maintain the suit, and as P had become a *sanyasi*, he was civilly dead. The plaintiff who was the reversionary heir can also, on this ground, maintain the suit.

Sections 107 and 108. Section 108 is a *proviso* to section 107. The continuance of the existing life is presumed. The presumption does not say anything as to the exact time of death ; that must be proved by other evidence and circumstances.[1] It depends on the circumstances of each case to draw a presumption that a person was alive for seven years after he was last heard of.[2] The onus to prove the death is upon the person who says that the death took place at any particular time within seven years.[3] Section 108 deals with the question whether a man is alive or dead when the question of death is raised and not whether he was alive or dead at some antecedent date.[4] There is no presumption that a person died during the first period of seven years if he was not heard of for more than seven years.[5] The onus to prove that the suit was brought by the reversioner within 12 years from the death of the widow lay on the reversioner and the fact that the widow was not heard of since 1870 did not shift the onus.[6]

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[1] *Dharup Nath* v. *Govind Saran*, 8 All. 614.

[2] *Veeramma* v. *Chenna Reddi*, 37 Mad. 440.

[3] *Rango* v. *Mudiveppa*, 23 Bom. 296, 306.

[4] *Phani Bhusan Banerjee* v. *Surya Kanta Roy Chowdhry*, 35 Cal. 25 ; *Narki* v. *Lal Sahu*, 37 Cal. 103.

[5] *Muhammed Sharif* v. *Bande Ali*, 34 All. 36, F. B.

[6] *Jaywant Jivanrao* v. *Ramchandra*, 18 Bom. L. R. 14.

109. Burden of proof as to relationship in the cases of partners etc. When the question is, whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proof that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Cases. Non-payment of rent for many years does not put an end to the relationship between landlord and tenant if it has once been proved to exist.[1] The extinguishment of a juridical relation is on the person who alleges it. Jointness of Hindu family is presumed to continue and the *onus* is on the person who alleges its partition.[2]

110. Burden of proof as to ownership. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Cases. Title is to be presumed from lawful possession until a better title is proved.[3] Possession has a two-fold value. It is evidence of ownership and foundation of a right to possess. A plaintiff may recover possession from a trespasser by instituting a suit under section 9 of the

[1] *Rangolall* v. *Abdool Guffoor*, 4 Cal. 314.

[2] *Abhay Charan* v. *Huri Nath*, 8 Cal. 72.

[3] *Jodh Singh* v. *Sundar Singh*, P. R. No. 122 1882; *Govind Prasad* v. *Mohan Lal*, 24 All. 157.

Specific Relief Act within six months from the trespass, or by establishing his title by a prior legal possession, though short of 12 years, under section 8 of the Specific Relief Act, provided the trespasser had no better title.[1] The Calcutta High Court held that the plaintiff can not recover possession without proof of his title by adverse possession for a period of twelve years even against a person who had no title.[2] But doubt has been expressed as to the correctness of this view in *Shyama Charan Ray* v. *Surya Kanta Acharya*, 15 C W. N. 163, and *Manik Borai* v. *Beni Charan*, 13 C. L. J. 649. The Privy Council held that a lawful possession short of 12 years gave a good right against a mere trespasser and the plaintiff was allowed a declaratory decree and an injunction in the first case and an ejectment decree in the second.[3] The Madras,[4] Allahabad[5] and the Patna[6] High Courts held that a possessory title acquired by possession of less than 12 years gave a right to eject a mere trespasser.

111. Proof of good faith in transactions where one party is in relation of active confidence. Where there is a question as to the good faith of a transaction between

[1] *Hari Khandu* v. *Dhondi Natha*, 8 Bom. L. R. 96 ; *Pemraj* v. *Naravan*, 6 Bom. 215, F. B. ; *Hanmantrav* v. *Secretary of State*, 25 Bom. 287.

[2] *Nisa Chand* v. *Kanchiram*, 26 Cal. 579, 584 ; *Shama Churn* v. *Abdul Kabeer*, 3 C. W. N. 158.

[3] *Ismail Ariff* v. *Mahomed Ghouse*. 20 Cal. 834, P. C. ; *Sundar* v. *Parbati*, 12 All. 51, P.C.

[4] *Krishna Aiyar* v. *The Secretary of State*, 33 Mad. 273.

[5] *Wali Ahmad* v. *Ajudhia Kandu*, 13 All. 537, F.B.

[6] *Haradhan Mandal* v. *Iswar Das*, 2 P.L. J. 61.

parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

ILLUSTRATIONS

(a) The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.

b) The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.

Cases. Persons standing in a confidential relation can not hold benefits from others without proving that the latter persons had independent advice in conferring such benefits.[1] The onus is upon the person to prove that the deeds of powers executed by *pardanashin* ladies had been explained to, and understood by, them.[2] A deed of gift executed by a lady in favour of her guru was cancelled in the absence of evidence that the transaction was made without undue influence and in good faith.[3]

112. Birth during marriage conclusive proof of legitimacy. The fact that any person was born during the continuance

[1] *Raghunathji Mulchand* v. *Varjiwandas Madanjee*, 8 Bom. L. R. 525.

[2] *Sudisht Lal* v. *Mussamut Sheobarat Koer*, 7 Cal. 245, P.C.

[3] *Mannu Singh* v. *Umadat Pande*, 12 All. 523.

of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

What presumption will the Court draw as to legitimacy?

Sections 112 and 113 are *conclusive proofs* and exclude further evidence on the points with which they respectively deal.

Cases. The continuance of relationship, such as marriage, must be presumed.[1] This section does not bar the proof of legitimacy of a child born more than 280 days after the dissolution of marriage.[2] Legitimacy must be established by proof that the child was born within 280 days after the death of his father.[3]

113. Proof of cession of territory. A notification in the *Gazette of India* that any portion of British territory has been ceded to any Native State, Prince or Ruler, shall be conclusive proof that a valid cession of such territory took place at the date mentioned in such notification.

Comment on this proposition.

Comment. This section has been made a dead letter by the Privy Council ruling that a competent Court can inquire into the validity of the question as to the cession of territory by the Government

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[1] *Bhima* v. *Dhulappa*, 7 Bom. L. R. 95.

[2] *Rahmat Ali* v. *Mut. Allahdi*, P. R. No I of 1884.

[3] *Narendra* v. *Ram Govinda*, 29 Cal. 111, P.C.

of India or the allegiance of British subjects. It also decided that Act 24 and 25 Vic., c. 67, section 22, precluded the Governor-General in Council from legislating as to the sovereignty or dominion of the Crown.[1]

114. Court may presume existence of certain facts. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

ILLUSTRATIONS

The Court may presume—

(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession ;

(b) *that an accomplice is unworthy of credit, unless he is corroborated in material particulars* ;

(c) that a bill of exchange, accepted or endorsed, was accepted or endorsed for good consideration ;

(d) that a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence ;

(e) that judicial and official acts have been regularly performed ;

(f) that the common course of business has been followed in particular cases ;

[1] *Damodar Gordhan* v. *Deoram Kanji*, 1 B. 367, P. C.

(g) that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it;

(h) that, if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him ;

(i) that, when a document creating an obligation is in the hands of the obligor, the obligation has been discharged.

But the Court shall also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before it:—

as to *illustration* (*a*)—a shopkeeper has in his till a marked rupee soon after it was stolen, and can not account for its possession specifically, but is continually receiving rupees in the course of his business ;

as to *illustration* (*b*)—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done and admits and explains the common carelessness of A and himself ;

as to *illustration* (*b*)—a crime is committed by several persons : A, B and C, three of the criminals, are captured on the spot, and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable ;

as to *illustration* (*c*)—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person, completely under A's influence ;

as to *illustration* (*d*)—it is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course ;

as to *illustration* (*e*)—a judicial act, the regularity of which is in question, was performed under exceptional circumstances ;

as to *illustration* (*f*)—the question is, whether a letter was received. It is shown to have been posted but the usual course of the post was interrupted by disturbances ;

as to *illustration* (*g*)—a man refuses to produce a document, which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family ;

as to *illustration* (*h*)—a man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnectd with the matter in relation to which it is asked ;

as to *illustration* (*i*)—a bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

Comment. Section 114 has given the Court power to presume a *fact* to be true in exercise of its reasonable and judicial discretion, or to call for evidence in the first instance to prove such fact.[1]

Cases. The mere recent possession of stolen property is either the evidence of theft or of receipt of stolen property knowing it to be stolen.[2] If an official act has been proved to have been done, it will be presumed to have been regularly done.[3]

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[1] *Muthukumarswami* v. *King Emperor*, 35 Mad. 397.

[2] *Ishen Chandra* v. *R*, 21 Cal. 328, 336.

[3] *Narendra* v. *Jogi Hari*, 32 Cal 1107, 1121.

Post marks on letters are *prima facie* evidence that the letters were in the post at the time and place therein specified.[1] Presumption would be drawn that witnesses produced but not examined by a party would have deposed against him.[2] The production of a bond by the defendant with the endorsement of payment thereon stilted the onus on the plaintiff to show that the debt was still outstanding.[3]

CHAPTER VII

ESTOPPEL (SS. 115—117)

What do you understand by estoppel? Enumerate and illustrate different kinds of estoppels. What is the main determining fact of each kind? What are the three classes of estoppels according to

Estoppel in English Law. In *English Law*, there are three kinds of estoppels, viz, (i) estoppels by record, (ii) estoppels by deed, and (iii) estoppels in *pais*.

An *estoppel by record* means an estoppel by judgment. Sections 40–44 of the I. E. Act and sections 11-14 of the C. P. Code deal with estoppels by record. Its characteristic is ordinarily to oust the Court's jurisdiction from trying the same matter over again and it may also operate otherwise in determining relevancy of facts. A judgment by a competent Court precludes the parties or their representatives from agitating the same matter over again in a Court of Justice.

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[1] *Taylor*, s. 179.

[2] *Rajah Nilmoney* v. *Ramanoograh*, 7 W. R 29, 30.

[3] *Muhammad Mehdi Hasan* v. *Mandir Das*, 34 All. 511.

An *estoppel by deed* is based on the principle that a person who has solemnly asserted a state of fact in a document executed with solemnities and ceremonies should not be permitted to disavow it.

English law and how may kinds of these are recognised in the I. E. Act? Bom. 1893. Explain the expression "estoppel by matter in *pais*." Explain the doctrine of estoppel.

An *estoppel in pais* means an estoppel by conduct independent of record or instrument. It may be by writing which is not a deed, or by words of mouth, or by any other representation or act, or any other way, but sufficiently clear to express intention of the person who makes it. Estoppels in *pais* may be divided into (a) estoppels by agreement or contract, and (b) estoppels by conduct.

Strictly speaking, *the Indian Evidence Act* deals with three kinds of estoppels, *viz.* estoppels (a) by *records or judgments*, (b) by *conduct or representation*, and (c) by *agreements*. The last two kinds include estoppels by deed and conduct. Sections 40-44 deal with estoppels by judgments and section 115 deals with estoppels by conduct. Sections 116 and 117 deal with special estoppels arising from contracts. In 33 Cal. 915, it has been held that the rules of estoppel contained in sections 115-117 are not exhaustive, but in 35 Cal. 904 it has been held that section 115 is exhaustive as to the ordinary law of estoppel in India

Estoppel and Res Judicata. Res judicata is a sort of estoppel. It is called an estoppel by judgment. It prevents a Court from hearing a matter in a subsequent litigation which had once before been heard and finally decided by a Court of competent jurisdiction between the parties or the persons under whom the parties in the subsequent litigation litigate. Estoppels prevent a party from taking advantage of his own wrong. If a person had made a statement or representation and thereby induced another to act on such representation and by his so acting altered his position, it is but natural justice and public

policy for the safety of society that the person making the representation should not be allowed to deny its truth. The effect of both estoppel and *res judicata* is to exclude evidence of matter which has been settled between the same parties judicially or otherwise.

What is an estoppel and who are bound by it? Give examples. Discuss the law of estoppel as codified in section 115 of the I. E. Act.

115. Estoppel. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true, and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.

ILLUSTRATION

What is an estoppel?

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale he had no title: he must not be allowed to prove his want of title.

The law of estoppel discussed. Three things are necessary to constitute an estoppel, *viz*,

State fully the circumstances in which a person is estopped from denying the truth of his previous representation.

(i) There must be a declaration, act or omission intentionally causing or permitting a belief in another:

(ii) the latter person must act on such belief:

(iii) by his so acting he has altered his position.

No fraudulent intention on the part of the person who makes a declaration or does an act or omission is necessary. His intention can be

inferred from the objective standard which to a man of ordinary prudence, is ascribed under the circumstances of a particular case. In order to induce the faith in a man, the representation must be made relating to existing facts and not relating to facts which may occur in future or future promise. There is no estoppel on a point of law. There is no estoppel where the facts known to the person whose faith has been induced by any representation, act or omission.

What general conditions are necessary to the creation of an estoppel? State the provisions of the Indian Evidence Act regarding estoppels. (Sections 115-117.)

Principle. The law of estoppel is founded on the principle of *natural justice* and *public policy*. It is unjust and inequitable to allow a person to approbate and reprobate according to his own convenience and interest to the prejudice of another. Every honest man is bound to speak the truth and he should be compelled to make good his statement: otherwise mischiefs would inevitably result from uncertainty, confusion and want of confidence in transacting business.

Discuss the principle on which the rule of estoppel as laid down in section 115 of I. E. Act rests. Give illustrations. Explain the principles and justification of estoppel giving reasons.

The determining element of enforcing an estoppel by misrepresentation is that the person to whom such misrepresentation has been made was influenced by such misrepresentation and by acting thereon has altered his position.[1]

What in your opinion is the determining element of enforcing such principles in

Person. In 26 Cal. 381, it has been held that the word person means one of full age and competent to enter into a contract. So, a minor is not such a person within the meaning of section 115 so as to be estopped by his declaration, act or omission.[2] But 29 Cal. 126, 20 C. W. N. 418 and 21 Bom. 198 did not accept the interpretation of the ruling in 26 Cal. 381. It appears that a minor,

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[1] *Sarat Chunder* v. *Gopal Chunder*, L. R. 19. I. A. 203, 215, 216.

[2] *Brohmo Dutt* v. *Dharmo Das Ghose*, 25 Cal. 616

the case of estoppel by misrepresentation.

guilty of fraud by representation, may be estopped. This view is supported by the other High Courts as well.[2]

Does the doctrine of estoppel apply to infants? If so, under what circumstances and, subject to what limitations?

A contractual obligation entered into by the defendant while an infant even by means of a fraud as to his age was not enforced.[3] But this view was not approved of by the Privy Council in *Mohomed Syedol Ariffin* v. *Yeoh*, 19 Bom. L. R. 57, P. C. followed in 15 N. L. R. 149. The case in 26 Cal. 381 came in appeal before the Privy Council which decided the case on the ground that as the minority was known to both the parties, there could be no estoppel.[4]

* *

To what extent, under what circumstances, may the conduct on the part of a person operate as an estoppel against him?

"Declaration act or omission." In English Law, the word 'representation' is used to express these three terms. The representation may be express or implied. The conduct of the person may amount to representation.[5] His silence under the circumstances where he is bound to speak may amount to representation. (*Jakhomull Mehera* v. *Saroda Prasad*, 7 C. L. J. 604). Such representation must be clear, unambiguous, free, voluntary and without any artifice. It must be confined to existing facts.[6] If it refers to any point of law, it does not constitute

[1] *Dharmo Das Ghose* v. *Brohmo Dutt*, 25 Cal. 616; *Surendra Nath Roy* v. *Krishna Sakhi Dasi*, 15 C. W. N. 239.

[2] *Jagannath Singh* v. *Lalta Prasad*, 31 All. 21, 26, 34; *Radhe Shiam* v. *Behari Lal*, 40 All. 558; *Vaikuntarama Pillai* v. *Authienoolam Chettiar*, 38 Mad. 1071.

[3] *Leslie Ltd* v. *Sheil*, (1914) 3 K. B. 607-618.

[4] *Mohori Bibee* v. *Dharmo Das Ghose*, 30 Cal. 539, 545, P. C.

[5] 20 Cal. 296, 310, P. C.

[6] *Jethabhai* v. *Nathabhai*, 28 Bom. 399, 407.

any estoppel (21 All. 285). 'If a faith has already been caused by some other fact, the continuance of such faith or belief by virtue of any representation will not constitute any estoppel[1] In order to constitute an estoppel it must clearly and without doubt be found that the person who pleads estoppel was initially induced to believe the representation and acted on such belief.[2]

* * *

How has the word 'intentionally' been explained by the Judicial Committee of the Privy Council in 20 Cal. 296 (Sarat Chunder v. Gopal Chunder).

"Intentionally". It has been held in 20 Cal. 296 P.C. (*Sarat Chandra* v. *Gopal Chandra*) that a person has intentionally caused another person to believe in his declaration, act or omission and to act upon that belief if a reasonable man would take the representation to be true and believe that it was meant that he should act upon it. The objective standard of an ordinary man of prudence to act upon the belief induced by the declaration, act or omission has been accepted by the Privy Council to construe the intention on the part of the person against whom the estoppel is to operate.

"To believe a thing to be true and to act upon it" Section 115 requires that a declaration, act or omission must cause a belief in another to believe a thing to be true and to act upon it. The representation made by one and the action taken thereon by another must be connected as cause and effect. There is no estoppel, if the person to whom the representation was made did not believe it to be true or if he did not act upon it or if he was under an obligation to make enquiries for himself about the matter and did not make such enquiry or if the truth of the matter is known to him (30 Cal. 539, P.C.).

[1] *Joy Chandra Banerjee* v. *Sreenath*, 32 Cal. 357.

[2] *Mohori Bibee* v. *Dharmo Das Ghose*, 30 Cal 539, P. C.

Is intention to deceive necessary to operate estoppel ?

Is intention to deceive necessary to operate estoppel ? Fraudulent motive or knowledge, on the part of the person who makes the representation, does not form any condition to constitute an estoppel. A declaration, act or omission, with the intention to induce a belief, is the determining factor to constitute an estoppel. A declaration, act or omission, with the intention to induce a belief, is the determining factor to constitute an estoppel, provided the person to whom the representation has been made has believed in the truth of such representation and by acting on such belief altered his position.

Distinguish between estoppel and presumptions. Distinguish between estoppel and admission. Section 31.

Estoppel and Presumption distinguished. Presumption is a proof. When it is conclusive, it is so as against all the world and a title may be founded on it. Estoppel operates only as a personal disability against a particular individual or his representative disabling him from asserting certain facts. It differs from conclusive presumptions because it can be waived, whereas presumptions can not be waived. A stranger can take advantage of a presumption but he can not take advantage of an estoppel.

How far is representation relating to a promise in future binding as an estoppel ?

Estoppel by promise in future. To constitute an estoppel it is necessary that the person to whom the promise or representation is made should act upon it so as to change his position thereby. Therefore, *a representation relating to a promise in future* can not operate as an estoppel. The person to whom the representation is made is at liberty not to act upon it.

Distinguish between ostoppel and conclusive proof.

Estoppel and Conclusive Proof. A *conclusive proof* may be the foundation of a claim and it is evidence against all the world. An estoppel operates only against the person who induces another to act upon his statement or conduct. It can not be the foundation of a right against strangers.

116. Estoppel of tenant and of license of person in possession. No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof shall be permitted to deny that such person had a title to such possession at the time when such license was given.

What cases of estoppel by contract are provided by the I. E. Act? What is the rule of estoppel as regards tenants? Can a tenant prove that the title of his landlord has ceased? State the rule of estoppel as regards a tenant and licensee under the I. E. Act. How far and under what circumstances are tenants and licensees permitted to deny the title of their landlord or licensor as the case may be?

During the continuance of the tenancy. A tenant who has been inducted into possession by the landlord is not entitled to deny the landlord's title so long as he retains such possession as a tenant. Even after the expiry of the term of the tenancy he can not deny it without surrendering possession. But, if during the continuance of the tenancy, the title of the landlord has been extinguished subsequent to the creation of the tenancy, the tenant can show that the landlord's title has been extinguished [1]. The Madras High Court held that the tenant can impeach landlord's title if the lease was procured by fraud, misrepresentation or coercion or in ignorance of defect of landlord's title (40 Mad. 561, F. B.).

At the beginning of the tenancy. If the tenant is inducted into possession, he is not entitled to deny the landlord's title. But, if he had been in possession from before the creation of the tenancy, he is not estopped from showing that the landlord had no title when he settled the land with

[1] *Bamandas* v. *Nilmadhab*, 44 Cal. 771, 777.

the tenant (*Lal Mahomed* v. *Kallames*, 11 Cal. 519).

What cases of estoppel by contract are provided by the Evidence Act?

117. Estoppel of acceptor of bill of exchange, bailee or licensee. No *acceptor of a bill of exchange* shall be permitted to deny that the drawer had authority to draw such bill, or to endorse it :

nor shall any *bailee or licensee* be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment, or grant such license.

Explanation 1.—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation 2.—If a bailee delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.

Case. The licensees were estopped from questioning their licensor's title or validity of the license (42 Cal. 262).

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CHAPTER IX.

Of[1] Witnesses (Ss. 118-134)

118. Who may testify. All persons shall be competent to testify unless the Court considers that they are prevented from understanding the question put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation. A lunatic is not competent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Who are competent to testify to judicial proceedings? What matters would you take into consideration in estimating (a) the capacity of, and (b) the credit due to, a witness?

Competency (Ss 118-120) and compellability of witnesses The only test of competency in *India* is the capacity to understand the questions put to a witness.[1] But, in *England*, it is necessary that a witness, to be competent, must have religious faith and must understand the liability to punishment for making a false statement. The Bombay High Court requires that the Court should satisfy itself that the witness is competent to testify before he is examined.[2] But the other High Courts hold that the competency of a witness may be tested during the course of examination.[3] According to the Bombay, Calcutta and Patna High Courts, the omission to administer an oath does not make

State the law relating to competency and compellability of witness.

[1] *Queen Empress* v. *Ram Sewak*, 23 All. 90.

[2] *Emperor* v. *Hari Ramji*, 20 Bom. L. R. 365.

[3] *Nafar Sheikh v. Emperor*, 41 Cal. 406.

evidence inadmissible.[1] The Allahabad High Court and the Chief Court of Lower Burma have taken a different view.[2] The Madras High Court has recently accepted the view of the Bombay High Court.[3]

According to sections 132, 147 and 148, a witness is not excused from answering questions relevant to the matter in issue in a civil or criminal proceeding. According to sections 130 and 131, a witness may be compelled to produce a document.

119. Dumb witnesses. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing, or by sign; but such writing must be written, and the signs made, in open Court. Evidence so given shall be deemed to be oral evidence.

120. Parties to civil suits and their wives or husbands: husband or wife of person under criminal trial. In all *civil* proceedings, the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses.

In *criminal* proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

See notes under section 122.

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[1] 16 Bom. 359; 14 Ben. L. R. 294, F. B P. L. J. 147.

[2] 11 All. 183; 9. L. B. R. 88.

[3] 38 Mad. 550.

121. Judges and Magistrates. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

State the circumstances under which the privilege not to disclose privileged communications can be claimed? (Sections 121-131.) From what questions will a witness be excused or protected by the Court? What privileges can be claimed by Judges, if called as witnesses? What are privileged communications? When are witnesses excused from answering questions put to them in Court.

ILLUSTRATIONS

(a) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B cannot be compelled to answer questions as to this, except upon the special order of a superior Court.

(b) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said except upon the special order of the superior Court.

A is accused before the Court of Session of attempting to murder a police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occured.

Privileged communications. Sections 121-131 are exceptions to section 118. Some witnesses are privileged by law not to speak on matters which they are not willing to speak. There are other matters which the witnesses are not entitled to disclose even if they are willing to disclose. Properly speaking, the latter class of communications may be called *privileged communications*; but, in general parlance, all communications which the witnesses are not compelled to disclose or are not permitted to disclose are called privileged communications.

What communications are witnesses not permitted or compelled to disclose? Compare the English and the Indian Law as to the admissibility of a wife's evidence for or against her husband in civil and criminal cases. What privileges can be claimed by married persons if called as witnesses?

The privilege given by this section may be waived by the witness. (3 All. 573, F. B.). A Judge must conceal a fact within his own knowledge unless he be first sworn (13 W.R. Cr. 60).

122. Communications during marraige. (1) No person who is or who has been married shall be compelled to disclose any communication made to him during marraige by any person to whom he is or has been married :

(2) nor shall he be permitted to disclose any such communication, unless the person who made it or his representative in interest consents, except (a) in suits between married persons, or (b) in proceedings in which one married person is prosecuted for any crime committed against the other.

Compare English and Indian Law as to the extent to which the husband and wife are competent witnesses for or against each other in criminal cases.

Indian and English Law Compared. Under section 120 of the I. E. Act, husbands and wives are competent witnesses for or against each other both in civil and criminal proceedings. But, in *England* they are not so competent in criminal proceedings, except in cases when an injury to the person or property of one is committed by the other.

Case. A document in the hands of third persons containing such communications is admissible (22 Mad. 1, 4).

123. Evidence as to affairs of State. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State except with the permission of the officer at the head of the Department concerned, who shall give

or withhold such permission as he thinks fit.

What are the rules of evidence relating to affairs of State and official communications ? What privileges can be claimed by police officers if called as witnesses ?

124. Official communications. No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure.

125. Information as to commission of offences. No Magistrate or Police-officer shall be compelled to say whence he got any information as to the commission of any offence and no Revenue Officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Explanation. "Revenue Officer" in this section means any officer employed in or about the business of any branch of the public revenue.

Explain fully, giving examples and citing cases, how far professional communications are privileged and when a party is said to have waived privileges ? What professional communications between

126. Professional communications. No barrister, attorney, pleader, or vakil shall, at any time, be permitted, unless with his client's express consent,

(a) to disclose any communication made to him in the course, and for the purpose of his employment as such barrister, pleader, attorney, or vakil, by or on behalf of his client, or

(b) to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or

a party and his legal adviser are protected from disclosure? Sections 127-129

(c) to disclose any advice given by him to his client in the course, and for the purpose, of such employment :

Provided that nothing in this section shall protect from disclosure—

(1) any such communication made in furtherance of any illegal purpose ;

(2) any fact observed by any barrister, pleader, attorney, or vakil in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney, or vakil was or was not directed to such fact by or on behalf of his client.

Explanation. The obligation stated in this section continues after the employment has ceased.

ILLUSTRATIONS

(a) A, a client, says to B, an attorney, "I have committed forgery and I wish you to defend me."

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, an attorney, "I wish to obtain possession of property by the use of a forged deed on which I request you to sue."

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains B, an attorney, to defend him. In the course of

the proceedings, B observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, is not protected from disclosure.

127. Sec 126 to apply to interpreters, etc. The provisions of section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys, and vakils.[1]

128. Privilege not waived by volunteering evidence. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126; and, if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, pleader, attorney, or vakil on matters which, but for such question, he would not be at liberty to disclose.

When a party is said to have waived privileges:

129. Confidential communications with legal advisers. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in

[1] 26 Cal. 53.

which case he may be compelled to disclose any such communications as may appear to the Court necessary to be known in order to explain any evidence which he has given, but no others.

State briefly the provisions of the I. E. Act with reference to production of title-deeds by a witness. (See also section 162.)

130. Production of title-deeds of witness, not a party. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property or any document in virtue of which he holds any property as pledgee or mortgagee or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the production of such deeds or some person through whom he claims.

131. Production of document which another person, having possession, could refuse to produce. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last mentioned person consents to their production.

132. Witness not excused from answering on ground that answer will incriminate: Proviso. A witness shall not be excused from answering any question as to any matter *relevant to the matter in issue* in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question

(a) will criminate, or may tend, directly or indirectly, to criminate, such witness, or

(b) that it will expose, or tend, directly or indirectly, to expose, such witness to a penalty or forfeiture of any kind.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

English and Indian Law compared. In *England*, a witness is excused from answering criminating questions. In *India*, he is not so excused, but is protected from being arrested or prosecuted by his being compelled to answer criminating questions. If he voluntarily answers criminating questions and there is no compulsion to extort such answer from him, the protection is not afforded to him[1].

133. Accomplice. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

What is an accomplice? An accomplice is one connected with another or others in the commission of a crime.

Explain: "Approver".

* * *

Approver. When an accomplice is granted pardon under section 337, Criminal Procedure Code, he is called an approver. If he forfeits such pardon by making a false statement when deposing

What is an accomplice? State and discuss the Law of

[1] *Queen* v. *Gopal Das*, 3 Mad. 271, F. B.

in a trial against his co-accused, he is also tried for the offence.

Evidence of accomplices ? Compare the confession of a co-accused with the testimony of an accomplice. How far may a confession of one accused against his co-accused be taken into consideration in convicting the latter ?

Confession of a co-accused and the testimony of an accomplice. Confession of a co-accused is not a substantive evidence. Without corroboration, no conviction can be had on such confession. But the testimony of an accomplice is a substantive evidence and a conviction can be lawfully had on the uncorroborated testimony of an accomplice. But, as a matter of practice and judicial expediency, it is unsafe for a judge to convict an accused on the uncorroborated testimony of an accomplice and it is prudent on the part of a judge to warn the jury not to convict an accused on the uncorroborated testimony of an accomplice.

* * * **Section 114, illustration (b), and section 133 reconciled.** Illustration (b) of section 114 authorises a court to presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars. But section 133 authorises the court to convict an accused on the *uncorroborated testimony of an accomplice.* This contradiction has been got over in practice by the "universal adoption of the rule" that an accused shall not be convicted on the uncorroborated testimony of an accomplice without exceptional circumstances of a case justifying such conviction.[1]

Reconcile section 133 with illustration (b) of section 114. "The unsupported evidence of an accomplice is legally admissible but it is usual for a Judge to tell a jury that they are not to believe it." Develop.

The reasons why uncorroborated testimony of an accomplice is not sufficient to justify a conviction are :—

(i) his interest is to shift the guilt from himself by perjury :

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[1] 10 Bom. 319 ; 6 Bom. L. R. 481 ; 28 Cal. 689 ; 33 Cal. 1353 ; 28 Cal. 339 ;

(ii) he, being an immoral person, has no respect for truth :

(iii) he gives evidence under a promise of pardon and has motive enough to favour the prosecution.

The English and the Indian Law of Evidence are identical as to the evidentiary value of the unsupported evidence of an accomplice.

The *Madras*, *Allahabad*, *Panjab* and *Burma* Courts, however, hold that the uncorroborated evidence of an accomplice, if believed, may justify a conviction (35 Mad. 247 : 17 M. L. R. 113 : 35 Mad. 397 : 8 All. 306 : 1 L. B. R. 29 : P. R. No 17 of 1915, Cr.).

A retracted confession can not ordinarily take the place of legal proof (38 Cal. 559).

What is the ground upon which the evidence of an accomplice is admitted ?

Why is the evidence of an accomplice admitted ? The ends of justice under some circumstances require that the testimony of an accomplice shall be accepted. When the accomplice inculpates himself with others and there are circumstances leading to the conclusion that he has not been actuated by any motive to speak falsehood, his testimony is accepted to justify a conviction.

Discuss the question of the quantity of evidence required for judicial decision in India in civil and criminal cases and compare the provisions made in the I. E. Act. with the English Law on the subject.

134. Number of witnesses. No particular number of witnesses shall in any case be required for the proof of any fact.

As a general rule, the evidentiary value of the depositions of witnesses depends (as it should be) on their quality and not on their quantity. The intelligence and credit of a witness should be considered more in arriving at a judicial decision. Such is the law both in India and in England. But, in England, two witnesses are required to prove treasons, and corroborative evidence is required in the following cases—

(a) perjury :

(b) bastardy where the mother is the only witness:

(c) suits for breach of promise of marriage :

(d) treason etc.

CHAPTER X.

OF THE EXAMINATION OF WITNESSES.

(SS. 135—166).

135. Order of production and examination of witnesses. The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

136. Judge to decide as to admissibility of evidence. When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise.

If the fact proposed to be proved is one of which evidence is admissible only upon

proof of some other fact, such last-mentioned fact must be proved before evidence is given of the fact first mentioned, unless the party undertakes to give proof of such fact, and the Court is satisfied with such undertaking.

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

ILLUSTRATIONS

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under section 32.

The fact that the person is dead must be proved by the person proposing to prove the statement, before evidence is given of the statement.

(b) It is proposed to prove, by a copy, the contents of a document said to be lost.

The fact, that the original is lost, must be proved by the person proposing to produce the copy, before the copy is produced.

(c) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved,

or permit the denial of possession to be proved before the property is identified.

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact (A) can be regarded as the cause or effect of the fact in issue. The court may either permit A to be proved before B, C and D is proved, or may require proof of B, C and D before permitting proof of A.

Explain: "Examination-in-chief, cross examination."

137. Examination-in-chief, cross-examination and re-examination. The examination of a witness by the party who calls him shall be called his examination-in-chief.

The examination of a witness by the adverse party shall be called his cross-examination.

What is the meaning and object of cross examination, and re-examination ?

The examination of a witness, subsequent to the cross-examination, by the party who called him, shall be called his re-examination.

Meaning and nature or cross-examination and re-examination. The meaning of *cross-examination* is the interrogation of a witness by the adverse party with the object of eliciting facts favourable to such adverse party or of discrediting the witness. Its further object is to extract truth and expose falsehood,[1] to test the accuracy, credibility, and general value of the evidence given in-chief, to show his relation to the parties, his inclination and prejudice, his character and his means

What is re-examination and its object ?

[1] *Meer Sujad Ali* v. *Lalla Kasheenath Das*, 6 W. R. 181, 182.

of knowledge of facts he has deposed to, and to test his power of discernment and memory and his opportunity to know facts and his demeanour. A cross-examination must be relating to relevant facts, but it may extend beyond the range of examination-in-chief. In cross-examination, leading questions may be asked and irrelevant matters introduced to affect the credit of a witness by injuring his character. Even a party may be permitted to cross-examine his own witness when he is proved to be hostile to such party.

The party examining a witness has the right to re-examine him on all matters arising out of cross-examination for the purpose of explaining or reconciling any discrepancies between the evidence given in examination-in-chief and cross-examination and also for the purpose of removing any suspicion that the cross-examination has thrown on the evidence-in-chief or to enable the witness to speak the whole truth. With the permission of the Court a new matter may be introduced in re-examination, and in that case the witness may be cross-examined on such matter. No leading question can be asked in re-examination except with the permission of the Court.

What is the exact scope of re-examination ?

138. Order of examination: Direction of re-examination. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

What are the principal rules regarding the kind of questions that may be asked in examination-in-chief, cross-examination and re-examination ? (ss. 141-3, 146, 154).

The examination and cross-examination must relate to relevant facts, that the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

The re-examination shall be directed to

the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

What questions are to be asked in examinations-in-chief, cross-examination and re-examination ?

What questions are to be asked in examination-in-chief, cross-examination and re-examination ? The examination-in-chief and cross-examination must relate to relevant facts. No leading question shall be asked in examination-in-chief or in re-examination except with the permission of the Court. The Court may permit leading questions in examination-in-chief or in re-examination as to matters which are introductory or undisputed or which have already been sufficiently proved. Leading questions may be asked in cross-examination. A matter not relevant to the suit or proceeding may be asked to affect the credit of the witness by injuring his character, provided the question is proper. The cross-examination need not be confined to the facts to which the witness testified in his examination-in-chief. A witness may be cross-examined on new matters introduced in the examination. With the permission of the Court, a party may cross-examine his own witness if he is proved hostile to his interest. The re-examination shall be directed to the explanation of matters referred to in cross-examination to enable the witness to state the whole truth as to matters partially dealt with in cross-examination and to reconcile discrepancies existing between the evidence given in examination-in-chief and cross-examination.

139. Cross examination of person called to produce a document. A person summoned to produce a document does not

become a witness by the mere fact that he produces it and can not be cross-examined unless and until he is called as a witness.

140. Witness to character. Witness to character may be cross-examined and re-examined.

141. Leading questions. Any question suggesting the answer which the person putting it wishes or expects to receive is called a leading question.

* *
Explain "Leading questions."

142. When they must not be asked? Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

* *
Give reasons for the rule "A leading question may not be asked." State the exceptions.

Reasons why leading questions are not allowed. Leading questions are not allowed in examination-in-chief or re-examination because that will amount to allowing the pleader putting such questions to *tutor the witness* in the witness box, frustrate the object of cross-examination and *destroy the means of testing the truth.*

143. When they may be asked. Leading questions may be asked in cross-examination.

When are leading questions allowed? What questions are lawful when put in cross-examination by counsel of the opposite party? (ss. 145, 147-153).

Leading questions may be asked as of right under section 143. A party may put leading questions to his own witness with the consent of the Court under sections 154 and 155.

Case. The Court is to determine whether leading questions should be permitted (37 Cal. 467).

144. Evidence as to matters in writing. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

ILLUSTRATION

The question is, whether A assaulted B.

C deposes that he heard A say to D—"B wrote a letter accusing me of theft, and I will be revenged on him."

This statement is relevant as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

How and in what cases may the party

145. Cross-examination as to previous statements in writing. A witness may be cross-examined as to previous statements

made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved ; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

calling a witness (i) contradict, (ii) corroborate. When may leading questions be put in examination-in-chief ? (See also sections 154 and 155) What is the procedure to be followed when a witness has to be contradicted by a prior statement made by him in writing ?

146. Questions lawful in cross-examination. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

(1) to test his veracity,

(2) to discover who he is, and what is his position in life, or

(3) to *shake his credit*, by injuring his character, although the answer to such questions might tend, directly or indirectly, to *criminate* him or might expose or tend, directly or indirectly, to *expose* him to a penalty or forfeiture.

State the provision as to how the credit of adversary's witness may be shaken. State the law regarding questions which tend to incriminate a witness or to expose him to a civil liability. How can the credit of a witness be impeached ? When can the Court compell a witness to answer questions intende

Section 146 in supplementary to section 138.

Case. A witness may object to the question by saying that it is not relevant, or if relevant, it is relevant only as affecting his credit (3 Mad. 271, F. B.).

147. When witness to be compelled to answer. If any such question re

to affect his credit by injuring his character ?

to a matter *relevant* to the suit or proceeding, the provisions of section 132 shall apply thereto.

What questions affecting the credit of a witness by injuring his character are respectively proper or improper ?

148. Court to decide when questions shall be asked and when witness compelled to answer. If any such question relates to a matter *not relevant* to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations :—

State the circumstances when the I. E. Act excuses witnesses from answering questions put to them in Court. (Ss. 150-3). What provisions are there in the I. E. Act to protect a witness ainst improper cross-

(1) such questions are *proper* if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

(2) such questions are *improper* if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies :

examination :

(3) such questions are *improper* if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence :

(4) the Court may, if it sees fit, draw, from the witness's refusal to answer, the inference that the answer, if given, would be unfavourable.

What provision is made in the I. E. Act to prevent an abuse of the privilege granted to counsel to put discrediting questions to a witness in cross-examination ? (Ss. 149-150).

149. Question not to be asked without reasonable ground. No such question as is referred to in section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

ILLUSTRATIONS

(a) A barrister is instructed by an attorney or vakil that an important witness is a dakait. This is a reasonable ground for asking the witness whether he is a dakait.

(b) A pleader is informed by a person in Court that an important witness is a dakait. The informant, on being questioned by the pleader, gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dakait.

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dakait. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dakait.

150. Procedure of Court in case of question being asked without reasonable grounds. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil, or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil, or attorney is subject in the exercise of his profession.

From what questions shall a witness be excused or protected by the Court? (See sections 148, 151 and 152). When a witness is under examination, (a) what questions and enquiries may be forbidden, and (b) what questions must be forbidden, by the Court? (sections 148, 151 and 152).

151. Indecent and Scandalous questions. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless thy relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

152. Questions intended to insult or annoy. The Court *shall* forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

153. Exclusion of evidence to contradict answer to questions testing veracity. When a witness has been asked and has

answered any question which is relevant to the inquiry only in so far as it tends to *shake his credit by injuring his character*, no evidence shall be given to contradict him; but, if he answers falsely, he may afterwards be charged with giving false evidence.

* * *

To what extent may a witness be contradicted? What evidence of a witness is liable to contradiction? In a civil case are there any restrictions on the questions which may be asked in cross-examination? Has the Judge power to exclude any questions? If so, in what cases? Under what circumstances can the Court interfere with the cross-examination of a witness?

Exception 1.—If a witness is asked whether he has been previously convicted of any crime, and denies it, evidence may be given of his previous conviction.

Exception 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.

ILLUSTRATIONS

(a) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(c) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible, not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore.

In each of these cases, the witness might, if his denial was false, be charged with giving false evidence.

(d) A is asked whether his family has not had a blood-feud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

Is it often to a party to discredit his own witnesses or to put leading questions to them ?

154. Question by party to his own witness. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

What is the difference between a hostile and an adverse party ?

Hostile and Adverse witnesses. A hostile witness is one who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth.[1] An adverse witness is one whose interest is not to support the case of the party examining him. Parties are naturally adverse to each other although they are not hostile witnesses when on oath.

When may a party cross-examine his own witness ? What is the remedy if a party's own witness turns hostile ?

When a witness is proved to be hostile to the party who cites and examines him and is unwilling to answer questions put to him, he may, with the permission of the court, put leading questions to him or cross-examine him under sections 145, 146 and 155.

[1] *Luchiram Motilal* v. *Radha Charan*, 49 Cal. 93.

***155. Impeaching credit of witness.** The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him :—

Mention the ways in which the credit of wiinesses is is allowed to be impeached, with special reference to the circumstances under which the credit of one's own witnesses can be impeached ? Who can impeach the credit of a witness and how ? State when a leading question is allowed in examination-in chief. (Ss. 154-55)

(1) by the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit ;

(2) by proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement, to give his evidence ;

(3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;

(4) when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives can not be contradicted though, if they are false, he may afterwards be charged with giving false evidence.

ILLUSTRATIONS

(a) A sues B for the price of goods sold and delivered to B. C says that A delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(b) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

English and Indian Law distinguished.

Compare English and Indian Law as to (a) impeaching the credit of a witness, (b) dying declaration, and (c) admissibility in evidence of confessions made to or in the presence of a police officer. (See also ss. 32 and 27).

According to *English Law*, the credit of a witness may be impeached by evidence of facts contradictory of the evidence given by him. But section 155 of the *I. E. Act* is less extensive in this respect. The credit of a witness can be impeached only in the ways as mentioned in this section.

Case. The words *"which is liable to be contradicted"* mean which is relevant to the issue.[1]

What are the modes by which the the testimony of a witness can be corroborated under the I E. Act ? ss. 157-58).

156. Questions tending to corroborate evidence of relevant fact admissible. When a witness, whom it is intended to corroborate, gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occured, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

[1] *Khadijah* v. *Abdool Kurreem*, 17 Cal. 344, 347.

ILLUSTRATION

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occured on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

When could the previous statement of a witness be proved in order to corroborate his testimony ?

157. When former statements of a witness may be proved. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Case. Evidence of persons in whose presence a counsel repeated the conversation which he had with his junior is admissible to prove such conversation.[1]

Is there any and what means of discrediting the deposition of a witness in a prior judicial proceeding ?

158. What matters may be proved in connection with proved statement relevant under section 32 or 33. Whenever any statement, relevant under section 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

[1] *Bomanji Cowasjee In re*, 34 Cal. 129, P. C.

* * * Under what circumstances can a witness refresh his memory from a writing (a) made by himself, (b) made by another ? State the provisions of the I E. Act regulating the onus of proof as to the question regarding the use of documents to refresh the memory of a witness. (ss. 159, 161). What is meant by a witness refreshing his memory ? What documents may be used for this purpose ? What are the conditions to enable a witness to refresh his memory by reference to documents ? What is the right of the adverse party as to any writing used to refresh

159. Refreshing memory. (*a*) A witness may, while under examination, refesh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was, at that time fresh in his memory.

(*b*) The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.

(*c*) Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such document : Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

(*d*) An expert may refresh his memory by reference to professional treatises.

* **Why the opposite party is permitted to refresh memory.** The grounds upon which the opposite party is permitted to inspect a writing and to refresh the memory of a witness, are three-fold :—

(i) to secure the full benefit of the recollection of the witnesses as to the whole of the facts ;

(ii) to check the use of *improper* documents ; and

(iii) to compare his oral testimony with his written statement' (*In the matter of the petition of Jhubboo Mahton*, 8 Cal. 739, 744).

Case. Collection papers are no evidence *per se* but they may be used to refresh the memory of the person who collected rent in accordance with them (11 Cal. 407 ; 10 Cal. 248).

memory. (See ss. 159-161).

160. Testimony to facts stated in document mentioned in Section 159. A witness may also testify to facts mentioned in any such document as is mentioned in section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

ILLUSTRATION

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

161. Right of adverse party as to writing used to refresh memory. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it: such party may, if he pleases, cross-examine the witness there upon.

Can documents used by a witness to refresh his memory be subsequently put in and made evidence in the action? If so, how and by whom?

162. Production and translation of documents. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The

validity of any such objection shall be decided on by the Court:

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

If, for such a purpose, it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence : and, if the interpreter disobeys such direction, he shall be held to have committed an offence under section 166 of the Indian Penal Code.

163. Giving, as evidence, of document called for and produced on notice. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

164. Using, as evidence, of document, production of which was refused on notice. When a party refuses to produce a document which he has had notice to produce, he can not afterwards use the document as evidence without the consent of the other party or the order of the Court.

ILLUSTRATION

A sues B on an agreement and gives B notice to produce it. At the trial A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He can not do so.

165. Judge's power to put questions or order production. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:

Can a prisoner's Counsel cross examine witnesses summoned by the Court or by a co-prisoner? What are the powers of a Judge to put questions or order production? What is the object of the legislature in empowering the Judge to put any question to a witness at any time?

Provided that the judgment must be based upon facts declared by this Act to be relevant and duly proved.

Provided also that this section shall not authorise any Judge to compell any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would

be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document except in the cases hereinbefore excepted.

Object of the Legislature. The object of the Legislature in empowering the Judge to put any question to a witness at any time is to enable the former to *elicit the truth*. Each party is interested to set up and prove his own case and to demolish the case of his adversary. So, the real truth may not come out, unless the Judge is empowered to put questions relevant or irrelevant in any form to get the truth.

Restrictions imposed on the Judge to ask questions of a witness. Although a Judge can ask any question in any form at any time of any witness or of any party of any fact, relevant or irrelevant, and may order the production of any document or thing, he must base his judgment on facts declared by this act and duly proved.[1] He cannot also compel a witness to answer a question or produce a document which the witness would be entitled to refuse or produce at the instance of the parties. He cannot also ask any improper question. He is not entitled to admit secondary evidence without a case being made out to receive such evidence under section 65.

What restrictions are imposed on the general power of a Judge to ask questions of a witness?

166. Power of jury or assessors to put questions. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put, and which he considers proper.

[1] *Gya Singh* v. *Mohamed Soliman*, 5 C. W. N. 864, 865, 866.

CHAPTER XI

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE (S. 167.)

167. No new trial for improper admission or rejection of evidence. The improper admission or rejection of evidence shall not be ground of itself,

(a) for a new trial, or

(b) reversal of any decision in any case,

If it shall appear to the Court before which such objection is raised

(i) that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or

(ii) that, if the rejected evidence had been received, it ought not to have varied the decision.

Comment on this proposition.

The improper admission or rejection of evidence is no ground for the retrial of a case in appeal or revision provided there is sufficient evidence on the record to uphold the finding of the trial court [1]

This is a rule for *civil* and *criminal* cases. It applies to the High Court exercising its powers under clause 26 of the Letters Patent.[2]

Section 100 of *the Civil Procedure Code* makes a provision like section 167 of the I. E. Act. On second appeal, the High Court, under section 100 of the C. P. Code, has no power to go into the

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[1] *Lala Bunsidhar* v. *Government of Bengal*, 14 M. I. A. 86 ; *Emperor* v. *Panchu Das*, 47 Cal. 671, F. B.

[2] 4 C. W. N. 433.

question as to the sufficiency of evidence. So, it cannot decide whether the evidence, after excluding the evidence improperly admitted in the lower Court, is sufficient to uphold the finding of the lower Court on the merits. In such a case, the High Court has to remand the case for a new trial[1]. Where the High Court thought that an important document[2] was erroneously rejected or a material witness was not examined, it reversed the decision of the lower Court.

Section 537 (d) of *the Criminal Procedure Code* makes a similar provision. In *Ramesh Chandra Das* v. *Emperor*[4] and *Dal Singh* v. *Emperor*,[5] it was held that the High Court could uphold the verdict of the jury upon the remaining evidence after excluding the irrelevant and inadmissible evidence or could quash the verdict and order a retrial.

The High Court, acting under clause 26 of the *Letters Patent*, may follow the provisions laid down in section 167 of the I. E. Act.[6]

English Law. According to *English Law*, the Court will not act at all until some substantial wrong or miscarriage of justice has been occasioned. But, an Indian Court will vary the decision or reverse it or order a new trial on the ground of rejection or admission of the disputed evidence in cases of such defects affecting the merits.

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[1] *Palakdhari Rai* v. *Manners*, 23 Cal. 179.

[2] *Talewar Singh* v. *Bhagwan Das*, 12 C. W. N. 312.

[3] *Monilal* v. *Khiroda Dasi*, 20 Cal. 740.

[4] 46 Cal. 895.

[5] 19 Bom. L. R. 510, P. C.

[6] *Emperor* v. *Narayen*, 9 Bom. L. R. 789, F. B. (Cf. *Emperor* v. *Panchu Das*, 47 Cal. 671. F. B.).

SCHEDULE.

ENACTMENTS REPEALED.

See Section 2.

Number and year.	Title.	Extent of repeal.
Stat. 26 Geo. III., cap. 57.	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty fourth year of the reign of this present Majesty (intituled "An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies"), as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section 38 so far as it relates to Courts of Justice in the East Indies.
Stat. 14 & 15 Vic., cap. 99	To amend the Law of Evidence.	Section 11 and so much of section 19 as relates to British India.
Act XV of 1852	To amend the Law of Evidence.	So much as has not been heretofore repealed.
Act XIX of 1853	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	Section 19.
Act II of 1855	For the further improvement of the Law of Evidence.	So much as has not been heretofore repealed.
Act XXV of 1861	For simplifying the procedure of the Courts of Criminal Judicature not established by Royal Charter.	Section 237.